Silenced by Reason: The Creation of the Civilised Post-Divorce Family

Teresa Flynn
BA (Hons) Sociology

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Declaration

I declare that this thesis is my own account of my research and contains, as its main content, work which has not previously been submitted for a degree at any tertiary education institution.

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Teresa Flynn
Abstract

This thesis sets out to explore how family law has come to shape and regulate the nature of the post-divorce family, with particular reference to contemporary Australia. In so doing, it positions law as part of a broader set of behavioural, social and economic regulations through which separating families are re-formed in the contemporary context. In considering law in this wider context, I have a particular interest in the mediation process within family dispute resolution. Here I consider how the mediation process works to steer negotiations between divorcing parents in particular directions, and in the process potentially sidelines, or silences, other emotional and personal issues deemed to be irrelevant to the desired outcome, which is increasingly construed in terms of the 'best interests of the child'.

As the site of my analysis is the private, confidential and relatively unobserved process of mediation within family dispute resolution, I have drawn together a range of sources and insights to create an imagined representation of mediation as an analytical device for the purpose of discussion throughout the thesis. This allows me to illustrate certain interpersonal dynamics of the mediation process and pinpoint particular issues for discussion.

In order to investigate the factors that have contributed to the regulation of the post-divorce family over time I draw on three major theoretical sources. First, Michel Foucault and his ideas on governmentality; second Jacques Donzelot and his work on the policing of families from the mid-eighteenth century in France; and, third Norbert Elias's insights into the civilising process. Taken together these insights help to illuminate the often hidden but persuasive role of law, the broad social mechanisms by which separating families are regulated, how the regulation of behaviour and emotion at family breakdown relies on law working in co-operation with the social and behavioural experts, and how our social orderliness relies on our ability to civilise our behaviour. I also rely on a range of socio-legal interpretations of family law in developing an analytical perspective for investigating the ways in which law has operated over time and in the contemporary situation.

In the conclusion to the thesis I bring the central strands of my discussion together and consider how the process and practices of mediation within family dispute resolution 'help to shape the stories that are told' (Day Sclater, 1999a, p. 179), and in particular,
the way in which certain emotional and personal issues, deemed to be officially irrelevant to the desired outcome in mediation, are potentially sidelined or silenced.
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Introduction

*Family law engages the passions as no other part of our legal system does: and it is the hallmark of passion that it must exceed rationality* (Dewar, 1998b, p. 484).

This thesis aims to illuminate how an orderly agreement is reached in divorce mediation at a potentially chaotic time, and in particular, to explore how certain processes potentially silence particular views, voices, values and emotions to ensure a rational/civilised outcome. To achieve this I undertake a theoretical/historical analysis of the creation of the civilised post-divorce family by detailing the gradual legal-social-political developments relating to divorce in Australia. In this way I aim to provide a range of insights into the ‘silencing’ of other unruly views and voices and illuminate how the powerful rhetoric of the harmonious divorce operates as a mechanism of social governance. This exploration is based on the supposition that divorce is a potentially chaotic and emotionally charged time. The rhetoric of harmony, which pervades the divorce process, constructs children as vulnerable to the conflict of divorce and encourages parents to subordinate their own needs and desires and negotiate a post-divorce parenting agreement in the ‘best interests’ of their children. The main site of post-divorce negotiations is the apparently informal process of mediation in family dispute resolution which works to steer negotiations between potentially antagonised parents in particular directions, and in the process, potentially sideline or silence other issues deemed to be officially irrelevant to the desired outcome.\(^1\) As 95% of people who commence proceedings in the Family Court reach an agreement without the need for a trial there is evidence that the informal, private process of family dispute resolution (a process that takes place under the umbrella of potentially coercive law) is highly successful in managing behaviour and negotiating agreements between parents during the heat of divorce.\(^2\)

\(^1\) Throughout this thesis I use the term ‘mediation’ to depict the process of dispute resolution within family dispute resolution.

\(^2\) As the Family Court of Western Australia (2014) states, “95% of people who commence proceedings in the Family Court reach agreement and settle matters outside the formal operations of the court.”
**My personal experience of divorce**

My investment in understanding how the intensity of feeling and disagreement is managed at divorce for parents with dependent children is partly related to the fact that I have been through this process myself. In the mid-1990s I made an application for divorce, and, as a parent of a small child, before a divorce order could be made I had to attend mediation to negotiate a parenting plan with my child’s father. I had never been inside a court, dealt with a lawyer, or been involved in negotiations where the stakes were so high. I experienced a real level of vulnerability being in a courtroom in front of a magistrate, and being told that I needed to attend mediation to negotiate an agreement with my child’s father about outstanding matters concerning our child before a divorce order could be made. I was reminded that if we were unable to reach an agreement on these matters then the court would decide for us. I remember my sense of relief at being able to move out of the formalities of the court room, and into the more informal space of mediation, where I felt I would be able to speak the truth and contextualise my concerns as my child’s mother.

My experience of the mediation process left me feeling extremely unsettled. Initially I was confident that I would be able to speak of the concerns I had, that is, to speak as ‘the mother’ who knows this child so well. Instead I felt distanced from my child by the focus the negotiations took, and through the language the mediator used. For example, the emphasis was on ‘future’ parenting arrangements framed within a legal/child development perspective of what was considered fair and reasonable, with little or no relevance placed on the past. The history of the parenting relationship and the reasons for family breakdown were cast aside, and instead the importance of reaching agreement, and framing that agreement within what the court would think was fair and reasonable, was the context of our negotiations. As it turned out there was much left unsaid, and jammed somewhere in between the legal requirements for divorce, references to research findings on child development, and my silence (or silencing) as ‘the mother’, an agreement was reached.

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3 FLA s 55A
4 FLA s 63B and s 65D
5 This is not a feminist thesis, but I will signal gender implications throughout.
I left the mediation session with a mixture of relief and frustration. I was relieved to be away from the intrusion of the legal world into, what had previously been, my private world. I felt unsettled at having to formalise my future parenting arrangements, and have them scrutinised by powerful strangers, that is, the mediator and the magistrate. I was also frustrated and unsettled that I had not been able to speak louder during mediation – that is, louder than the background noise of law and the experts that were telling me what was best for my child, a child they did not know. As I thought back on it, I was puzzled by how this kind of ‘silencing’ had happened, and more importantly, how I had become implicated in silencing myself. I knew that I had been actively involved in the mediation process, and had helped shape the outcome, but I was left feeling frustrated that so much had been left unsaid.

I was thus left pondering how the mediation process works to steer negotiations between antagonised divorcing parents in particular directions and sidelines, or silences, other emotional and personal issues deemed to be irrelevant to the desired outcome, and how parents themselves contribute to this silencing.

**The thesis at a glance**

This thesis represents a journey. At its centre is my enduring interest in how the intensity of feeling and disagreement is managed at divorce for parents with dependent children. I started by concentrating on the role of family law, and have continued to be vitally interested in this area. However, as my exploration continued, I became increasingly convinced that it requires something more than law itself to manage the highly charged emotions surrounding family breakdown. Hence I expanded the scope of my considerations to include the broad social and behavioural means by which separating families are regulated, surmising that law plays a distinctive role in partnership with these other mechanisms.

In the course of my research I followed many different tracks, some were fruitful, others less so, but I kept returning to the sense that while law has a persuasive role in managing and regulating the separating family, the management of behaviour and emotions at divorce relies on something more than law itself. I have also come to realise that understanding the distinctive role of law in this respect also requires an understanding of the frameworks of liberal governance in which law is embedded and enabled to play its part. Within this perspective, I have come to see that law’s efficacy in
relation to family regulation depends on its working alliance with social and psychological experts and the utilisation of notions pertaining to the 'best interests' of the child.

In considering law in this wider context, I increasingly focused on a site that had interested me from the outset: the mediation process within family dispute resolution – an apparently informal, private process utilised by separating and divorcing families to resolve disputes and form agreements on future arrangements. Various issues intrigued me. These included the high level of agreements reached; the pivotal place of a 'dispute resolution' discourse which privileges rationality and democratic dialogue over conflict and emotion; and the prevalence of a 'parenting' discourse centred on the 'best interests' of the child, which makes it difficult for a parent to assert a contrary view if she/he is not to be considered a 'bad' parent. All such factors, I surmise, help to steer the 'resolution' in certain directions and to make certain features of family separation visible and legitimate while silencing others. Law's distinctive role in this process remains of interest to me: among other things, it provides the institutional setting in which family dispute resolution takes place and offers direct sanctions if and when parents 'fail' to reach an agreement. At the same time, law's efficacy in these and other respects can only be understood in the context of the wider frameworks of liberal governance, expert interventions in family life, prevailing discourses on the child and family, and the patterns of parental self-control on which the family dispute resolution process depends.

My thesis, then, works at two levels. On the one hand, and with the family dispute resolution process at the end point of my considerations, I explore the broad social mechanisms that help to regulate behaviour and emotion at family breakdown; on the other, and as a consistent thread within this broad line of exploration, I keep returning to the particular part played by law.

The importance of the family for government

Dictionary definitions of the family tend to focus on the connections formed between people based on parentage, kinship, ancestry, or sharing a household.

**Family** (1) a group consisting of parents and their children living together as a unit, (2) a group of people related by blood, (3) the children of a
person or couple, (4) all the descendants of a common ancestor (*The Oxford English Dictionary*, 2005).

**Family** (1) parents and their children, whether living together or not, (2) one’s children collectively, (3) any group of persons closely related by blood, as parents, children, undes, aunts, and cousins, (4) all those persons descended from a common progenitor, (5) descent, especially good or noble descent, (6) a group of persons who form a household and who regard themselves as having familial ties (*The Macquarie Dictionary*, 1998).

While such definitions describe the family in terms of its structural characteristics, government and its associated agencies emphasise its qualities in relation to social stability and interpersonal responsibility. Thus, for example, the Australian Institute of Family Studies (2014), positions the family as the ‘glue’ that binds societies:  

We are each part of a family, despite wide differences in its form and cohesion or the degree of our contact with it. Well-functioning families have always been the glue that has bound communities together and strengthened societies, despite often being under pressure themselves. In turn, societies and their communities support families to stick together in good and tough times.

The *Family Law Act 1975* (Cth) (FLA) does not give a definition of the family, rather it promotes a particular perception of the family. As section 43(1)(b) of the FLA states, in exercising its jurisdiction, the Family Court (and any other court exercising jurisdiction under this Act), shall have regards to, ‘the need to give the widest possible protection and assistance to the family as the natural and fundamental group unit of society, particularly while it is responsible for the care and education of dependent children’ (Australia. ComLaw, 2015). In this way, the FLA emphasises its support for the family, particularly in relation to the interests of dependent children. Similarly, the Australian Bureau of Statistics (ABS, 2013) positions the family as being significant to the wellbeing of society:  

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6 The Australian Institute of Family Studies is an Australian Government statutory agency in the portfolio of the Prime Minister and cabinet established in February 1980 under the Australian Family Law Act 1975. Their main goal is to conduct high-quality research, relevant to policy and practice, on a broad range of issues regarding families in Australia.

7 For their purposes, the Australian Bureau of Statistics (ABS, 2015) note families may be comprised of:
- Couples with or without children of any age;
- Lone parents with resident children of any age; or
- Other families of related adults, such as brothers or sisters living together, where no couple or parent-child relationship exists.
Families are a vital part of society, forming the basic unit of home life for most Australian people. (...) The significance of the family to the wellbeing of a society as a whole is recognised by Commonwealth and State and Territory government agencies and a wide range of policies and programs are directed towards supporting families.

The modern family in Australia is the most popular household type and continues to grow rapidly and consistently. The ABS projects that the number of families in Australia will increase from 5.7 million in 2006 to between 8.0 and 8.2 million in 2031, representing a growth of between 40% and 43% over a twenty-five year period. Family households – which can contain more than one family – are identified as showing the greatest numeric increase in all households over the projection period, and remain the most prevalent household type in Australia.

Families are vital to government in economic, social and practical terms as they provide a vast source of emotional and financial support ‘free of charge’. As McDonald (1995) points out:

Families are by far the largest source of emotional, practical and financial support in our society and most of this support is provided free of charge, in money terms at least. The value of emotional support provided by families is inestimable, but the financial value of time and effort provided by households to their members without cost has been calculated as being at least equal to the entire gross national product of the country (as cited in Altobelli, 2003, p. 5).

Eekelaar (1989) suggests that when these resources (economic and moral) are dispersed through the well-functioning family, particularly to the benefit of children, government is happy to give the family a degree of autonomy, but if the family fails to fulfil this role as ‘resource distributor’, then government will intervene through a series of legal and behavioural interventions. In brief, this framework of expectations encourages governmental support for the family to strengthen the ties of responsibility between parents and children. If then, the intact family is disrupted through divorce, then law, together with other broad social and behavioural mechanisms, will work to create a functional ‘post-divorce’ family. As Day Sclater and Piper (1999b) argue, the ‘broken’ family must be made to re-invent itself as a ‘bi-nuclear’ family across two households. In this way, divorce has been “recast as a ‘stage’ (albeit a painful one) in the newly extended life course of the indelible nuclear family” (Neale & Smart, 1999, p. 37). Following Day Sclater and Piper (1999b, p. 6), the point I am emphasising here is that:
There can be no doubt that we, as individuals and as a culture, have a deep investment in ‘family’ as a guarantor of a stable society. Our so-called divorcing society has been held to be responsible for a whole range of social ills, and many feel ‘the family’ to be under threat. (...) there is a sense in which [divorce law reform] addresses concerns about the ‘decline of the family’ by providing for the emergence of a new post-divorce family.

**On the role of law**

The relevance of Eekelaar’s (1989) point – that legal involvement within the family is tied to whether the family is failing its obligation to ‘allocate resources’ to its members – is twofold. Firstly, it highlights the role of law as a ‘public instrument’ (Eekelaar, 1989); and secondly, it emphasises that it is only when the stability of the family is threatened, and the family’s ability to fulfil its role as resource distributor within the community is threatened, that law’s role in defining and enforcing the values associated with family life and social stability becomes visible, although it is always present in a dormant fashion. Dewar (2000a, p. 68) draws attention to law’s increasing presence in the separating family:

> It seems that such is the anxiety surrounding the perceived disintegration or decline in ‘family values’, as well as the financial costs of divorce itself, that families and family law have become central concerns of political debate. As a result, modern legislators have overcome their traditional respect for family ‘privacy’ and are now more willing than in the late 1970s to issue prescriptions for a ‘good divorce’.

In broadening the traditional scope of law to include the divorcing family, law can be seen to be working to contain support obligations within the post-divorce family. As I shall show, the focus of family law has increasingly come to focus on the ‘responsibility’ of parenthood, thus maintaining the economic and moral obligations within the family through parenthood rather than marriage. It is here that law depends on a working alliance with other social and psychological experts to establish the vital links between objectives of the state and the details of daily existence in the home. This working alliance between law and expert knowledge is a significant point, for, as John Dewar (1998b) has suggested in his writings on ‘The Normal Chaos of Family Law’, modern family law is an ‘exemplary case’ of what Marc Galanter (1992) calls ‘new legalism’, that is, it “incorporates materials or information from other disciplines, losing its distinctively legal flavour in the process” (Dewar, 1998b, p. 470). On this view, as Dewar (1998b, p. 474) following Galanter (1992) points out, modern family law...
operates by 'radiating messages', rather than conferring "measurable entitlements that one might expect in a court room." I will return to this important point in Chapter Two.

**Approach**

This thesis combines theoretical, documentary and observational sources to gain insights into the complexities of the workings of modern day family law, particularly the legal and extra-legal processes and practices that work to regulate or civilise the post-divorce family. As the site of my investigations is the private and confidential process of family dispute resolution, I have adapted a three-fold approach that will draw on a range of sources to gain insights into this practice and create a rich perspective for analysing how the post-divorce family is regulated in mediation, and in particular, how this process sidelines, or silences, other emotional and personal issues deemed to be irrelevant to the desired outcome.

**Theoretical sources**

Rather than relying on one primary theoretical source, this thesis combines a number of theoretical sources, most particularly Michel Foucault, Jacques Donzelot and Norbert Elias, to investigate the complexities of the workings of modern family law in its relation to the divorcing family. Foucault's notion of governmentality opens up lines of analysis for investigating the often hidden, but potentially persuasive role of law in the government of conduct; Donzelot takes Foucault's ideas a step further in his analysis of the increasing intervention of government into the sphere of the family in the name of the protection of the child; and Elias's theory of civilising processes enables insights into the civilising of post-divorce family relations – particularly the civilised parent.

In his writings on 'Governmentality', Foucault (1991) focuses on the tactics and strategies of government, which seek to shape conduct so as to achieve certain ends. In drawing on this as the starting point for my theoretical investigations, I aimed to gain a better understanding of the operation of power in modern society, particularly what seemed to be the often hidden but potentially persuasive role of law operating within the family dispute resolution process. As will be discussed in Chapter Three, Foucault's insights illuminate law's interesting part in the regulation of behaviour, and in particular, how law's relationship with governance requires knowledge, as in order for things to be governed they need to be knowable, and this encouraged and underpinned
the rise of the social and 'psy' sciences. This perspective has a three-fold significance for my purposes: it opens a way of looking at how populations can be governed through their capacity to govern themselves; it illuminates the significance of the family as an instrument of governance; and, highlights the important role that law plays in the process.

Jacques Donzelot’s (1979) *The Policing of Families: Welfare versus the State* develops Foucault's ideas and gives particular insights into the governance of the family from the mid-eighteenth century in France. In so doing, he portrays the working alliance between expert knowledge ('psy') and law, and highlights how this alliance enables law to intervene into the 'private' family without transgressing liberalist notions of the minimal state, or destroying family autonomy. In drawing on Donzelot’s ideas, I aimed to investigate how expert knowledge is put into practice, in particular, the way in which notions of the welfare or 'best interests' of the child have developed in family law, and how they have come to be at the centre of divorce dispute resolution.

In his writings on 'The Civilising of Parents’ and *The Civilising Process*, Norbert Elias (1998, 2000) illuminates how law relies on a particular 'civilising process' to occur at divorce to enable law to do its work. With his ideas on the 'civilising process' I aimed to gain a better understanding of how, in the midst of mediating an agreement at divorce – within a context of potential conflict and heightened disagreement – we have come to be at a place whereby the external mechanisms of social control need no longer be visible for individuals to still choose to moderate their behaviour and emotions. For Elias there is always some form of social orderliness to social interaction, and this social orderliness relies on our ability to civilise our own behaviour. In drawing on Elias’s insights, I aimed to understand how family law works alongside the internalised civilising mechanisms of rationality, impartiality and emotional neutrality in family dispute resolution to enable such high levels of agreements to be reached, despite the stress of divorce. This was the last piece of the theoretical puzzle I was searching for, and enabled me to draw all the threads of my thesis together.

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8 As previously cited, 95% of people who commence proceedings in the Family Court reach an agreement without the need for a trial. Though I accept that everyone who commences Family Court proceedings does not necessarily access family dispute resolution, I would argue that there is a powerful message (of behaviour moderation) in such high levels of informal agreements reached at divorce.
Documentary sources

As indicated, in selecting documentary resources I aimed to cover historical and contemporary developments in family law, with particular emphasis on the family dispute resolution process, as a means of understanding the evolving process through which law has come to shape the post-divorce family. To do this, I drew from legal textbooks, journal articles on family law, the Family Law Act 1975 (and amendments), mediation textbooks and mediator training manuals. I also kept up-to-date with family law reform and amendments, scholarly research on the family, divorce and family law, a range of governmental agencies research, and Family Court and family law updates, through regular online and library research.


More broadly, I drew on a number of book chapters and journal articles that articulated socio-legal insights into the development of family law as it related to the separated family, to mothers and fathers, and to the image of the ‘vulnerable child’ (Day Sclater and Piper, 1999b). Taken together, these socio-legal critiques of family law reform, practices of family law, the best interests of the child and the post-divorce family, provided a valuable perspective for investigating developments in family law, and interpreting theoretical insights, particularly in relation to the family dispute resolution process, and I refer to them throughout the thesis.

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9 This 2013 edition of Family Law in Australia marks the 40th anniversary of this book. In line with previous editions this updated edition provides a comprehensive perspective on the history of family law, as well as emerging issues, including a new chapter on dispute resolution. Throughout my research, I have also drawn on earlier editions of this book (with different teams of authors) to investigate and illustrate how family law has developed in Australia.
Observations

As well as gaining insights from theoretical and documentary sources, I endeavoured to gain some firsthand observational insights into family dispute resolution. As family dispute resolution is a private and confidential process, limiting the possibilities for direct observation, I drew on other sources during the course of the research in order to gain a better understanding of both the practices and process of family dispute resolution. I attended (as an observer) a semester course at Murdoch University on mediation, and attended the Family Court of Western Australia for the ‘Walk in their Shoes’ tour (on 25 September, 2013) to update myself with the current experience of making an application for divorce. These observations gave me insights into mediator training and the mediation process, and the current formal, legal procedure for a divorce application.

The Murdoch University Mediation unit (LAW 407) learning guide states that ‘the aim of this unit is to equip students with the skills to mediate disputes and educate participants in the theory of mediation’. The lectures I attended focused on the practices and process of mediation relating to a range of legal disputes, such as commercial and neighbourhood disputes, as well as the area of family law. What became clear – and what was relevant to my interests – was the importance placed on educating law students in the skills necessary to identify legal disputes suitable for mediation, rather than the adversarial legal process, and once in mediation how to identify such elements as the nature of the conflict, the behavioural styles of participants, when to talk and when to listen, and opportunities to settle. Hence, in attending these lectures I gained an understanding of the significance of mediation as a growing alternative to the adversarial legal process in family law, and how this alternative process relies on something more than legal knowledge – rather, there is an emphasis on training mediation students in extra-legal ‘psy’ knowledge.

The Family Court of Western Australia ‘Walk in their Shoes’ tour was jointly organised by the Family Court and the Western Australian Family Pathways Network (WAFPN).10

10 Family Law Pathways Networks have been established across Australia by the Attorney General’s Department to improve collaboration and coordination between organisations and professionals operating in the family law system in order to help separating and separated families obtain appropriate services. By ‘promoting awareness of services’ and arranging ‘cross-sectoral training’ we aim to enhance collaboration and improve overall assistance to separated and separating families (Western Australian Family Pathways Network, 2015).
WAFPN represents a collaboration of various organisations working in the area of family breakdown to provide a broad range of information and expertise, and to develop initiatives within the family law system. The information provided on this tour, made it clear that divorce is no longer about fault, and that the focus is now well and truly on the children involved in divorce, with the formalities of the divorce process all steered in this direction. As part of this, a ‘triage’ process is carried out on divorce applications to assess the potential for risk of harm to any children involved.

This risk assessment process requires a collaborative effort and information sharing between various agencies and departments, including the Department of Child Protection, Legal Aid, the Magistrates Court of Western Australia (which includes the Family Violence Court), the Department of Attorney General, and the Department of Corrective Services, as well as access to the CHIPS database. Together with the court-based case management process, overseen by court-based family consultants (who have a behavioural science background), a legal/expert framework is established to identify, calculate and potentially manage family risk issues in child-related divorce cases. There is a considerable amount of information easily available from the Family Court, online and within community legal centres to manage your own dispute, including checklists, and official forms and documents which set out step by step instructions for managing divorce negotiations out of court. There is also a comprehensive list of community based family dispute resolution services and providers available on the Family Court website to enable assistance if required.

From this visit I gained some first hand insights into how the legal world has expanded to incorporate and utilise varied sources of knowledge, and operate from multiple sites, in managing the modern day divorce process. No longer is the legal perspective on divorce about a magistrate in a courtroom making a decision as to who is at fault, rather, the modern day divorce process is about negotiating the future co-operation

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11 Members of WAFPN include representation from the Family Court of WA, Legal Aid and the Department for Child Protection and Family Support, as well as other agencies such as the Western Australian Police, Family Violence Intervention Services, and community based dispute resolution agencies.

12 The term ‘triage’ is generally used to prioritise action in an emergency. Within the assessment process of the Family Court the emergency is the potential for risk of harm to children.

13 The Magistrates Court CHIPS database is the Children’s Court of Petty Sessions system that details criminal convictions, outstanding criminal charges and Violence Restraining Orders, their proceedings and outcomes.
between parents in their relationship to their children while, at the same time, calculating the potential for risk of harm.

**Structure of thesis**

In the remainder of this chapter I briefly set out the lines of the argument followed in this thesis on a chapter-by-chapter basis. As explained above, the discussion involves a combination of historical and theoretical elements. The bulk of the historical background is provided in Chapter Two, which traces the history of marriage and divorce law, starting in England and then shifting the focus to Australia, up to present day. It gives an overview of the social factors bearing on the long history of marriage and divorce, including a range of economic, demographic and moral issues dealt with by and through law. It also describes the evolution of family law in Australia, and how law has come to encompass varied areas of family life.

Following the discussion on the history of marriage and divorce in Australian family law, in Chapter Three I draw on the work of Michel Foucault to illuminate the relation between governance, law and the family. The discussion highlights how governance operates in western democracies, and elaborates on the importance of the family as an instrument of governance. In setting out examples of the changing dimensions of family law against the moral and economic concerns of the state, it aims to illuminate the complex relationship between law and the disciplinary powers of the state. Drawing on *Foucault's Law* by Golder and Fitzpatrick (2009, p. 100), it describes how law, in “a relational dynamic of mutual constitution with disciplinary power”, develops and increasingly penetrates the domain of the family. It also highlights how subjects become involved in their own self-governance, and how the hidden power of law together with the ‘radiated message’ of the ‘good’ divorce sets limits on behaviour.

In Chapter Four I draw on Donzelot's development of Foucault’s ideas to highlight the working alliance between expert knowledge (‘psy’) and law to illustrate how this alliance enables law to intervene into the ‘private’ family. The discussion traces how expert knowledge claims have contributed to the post-separation parenting debate over the twentieth, and into the twenty-first century. Drawing on expert discourses such as those of John Bowlby (1952, 1953), and Joseph Goldstein, Anna Freud and Albert Solnit (1973), it tracks the expansion of considerations on the welfare of the child and family law reform. My discussion explores how the shifts in expert knowledge and legal intervention do not take place in a political and social vacuum, but as
endorsed and practiced by various institutions of the state. Following this, I trace how the rationalities underpinning these institutions have changed over time, with the aim of understanding how this overlap shapes the way in which family law elicits particular responses in family dispute resolution. My discussion explores how this combination of discourses is represented in the ‘best interests’ of the child principle – with a welfarist emphasis on protecting the vulnerable, and an advanced-liberal emphasis on parental responsibility and the calculation and management of risk. My emphasis is on how this works in dispute resolution to encourage parents to act responsibly in relation to the issues of family breakdown, but, if they fail to do so, then the ‘best interests’ of the child allows the state to act in a directive fashion.

Chapter Five is shaped around the way in which decisions are made and how behaviours and emotions are managed at the time of separation and divorce. Drawing on insights from Norbert Elias to illuminate the interpersonal dynamics at work in family dispute resolution, it sets out to explain how the regulation of emotion at family breakdown relies on something more than law – while also acknowledging that the persuasive role of law, in partnership with broad social and behavioural processes, plays a distinctive role through which divorcing parents are regulated in mediation. The emphasis is on the way in which the mediation process in family dispute resolution produces relatively orderly and predictable outcomes despite unruly emotions. It illuminates how the practices of mediation “help to shape the stories that are told” (Day Sclater, 1999a, p. 179), and how the very process of family dispute resolution itself produces particular outcomes.

In the next chapter, I set all of this in context by creating an imagined representation of family dispute resolution to illustrate the parameters of possibility in mediation. To do this I have drawn on a range of secondary sources and personal insights, including a DVD created by the Dispute Resolution Centre at Bond University, family mediation manuals, mediation textbooks, legal textbooks, and family law legislation. I have also drawn obliquely on my own experiences as noted above. I do not include this recreation of a mediation session in place of empirical data but rather as an analytical device to illuminate the essence of the phenomenon that intrigues me – that is, the phenomenon of silencing, which is difficult to identify and difficult to resist. I acknowledge there have been several important empirical studies of mediation
sessions involving interviews, surveys, recordings and some direct observation\textsuperscript{14}, but for the purpose of my exploration I wanted to illustrate moments of tension in mediation where parents are limited in their capacity to say the things that matter the most to them as mother and father of the child under discussion. I found that in trying to articulate the phenomenal quality of these moments the use of my ‘sociological imagination’ helped me articulate what it was that I was trying to get across in relation to the way in which the dominant discourse of the ‘good’ divorce can silence the emotional needs of the responsible/civilised parent. In the conclusion to my thesis I return to this representation of mediation and reflect on the nature of silencing, and in particular, the potential for mothers to be silenced by reason.

\textsuperscript{14} Such as Douglas and Batagol (2014), Coburn, Batagol and Douglas (2013), Trinder (2008), Greatbatch and Dingwall (2005), to name a few.
Chapter One

Family Dispute Resolution: An Imagined Representation

"Fiction reveals truth that reality obscures" (Ralph Waldo Emerson).

Laurence Boulle (2011, p. 4), Professor of Law at Bond University, Queensland, and former chair of NADRAC\textsuperscript{15} observes, that from a practical point of view it is difficult to obtain useful firsthand information about what happens in mediations as most are “conducted on a private and confidential basis.” He acknowledges that as research into this area is growing the difficulty of knowing what goes on in mediation is decreasing, but it still “remains a relatively unobserved and unexamined practice” (Boulle, 2011, p. 13). To overcome the lack of direct observation and examination of the detail of human drama in mediation, I have set the scene for my thesis by creating an imagined representation of mediation within family dispute resolution to illustrate the overall product of family dispute resolution.\textsuperscript{16} While I initially developed it as a learning tool to help me articulate and elaborate on the main points at issue, it increasingly became a useful point of reference, particularly as far as the later more theoretical parts of this thesis are concerned. In particular it has been useful in narrowing down and pinpointing the issues that initially prompted my interest in the management of behaviour and emotions at divorce. I have therefore included it as a substantive chapter in its own right, and will touch on it at various points throughout the thesis.

As discussed in the Introduction, my investment in this topic is partly related to the fact that I have been through this process myself. What follows though, is not an autobiographical account of my experience of family mediation, but rather, an imagined

\textsuperscript{15} National Alternative Dispute Resolution Advisory Council (NADRAC) was an independent body charged with providing policy advice to the Australian Attorney-General on the development of alternative dispute resolution (ADR) and with promoting the use and raising the profile of ADR. It was dismantled by the Australian government in 2013 and absorbed into the Federal Attorney-General’s Department.

\textsuperscript{16} While the 2006 reforms removed references to ‘mediation’ in the Family Law Act 1975 (Cth), replacing it with the generic term ‘family dispute resolution’, “it has been suggested that ‘facilitative mediation’ which is problem solving and thus resolution-focused is the model that is most commonly used in the Australian family law system” (Young et al., 2013, p. 57).
representation of the mediation process based on secondary resources and personal insights. The fictional elements are the characters and the storyline, but the matters, problems and human drama discussed are common to family mediation. I drew these from secondary material such as mediation manuals, mediation textbooks, legal textbooks and legislation dealing with marriage breakdown, a mediator training DVD, research papers, and other relevant literature.17

As previously established, my particular interest is the way in which the mediation process works to steer negotiations between divorcing parents in particular directions, and in the process potentially sideline, or silence, other emotional and personal issues deemed to be irrelevant to the desired outcome. With this in mind, I have created this story to explore this proposition further, as a way to gain insights from another perspective – that is, from being in the room. Academic analytical accounts cannot, and do not, attempt to explain the feelings and emotions in mediation; this, rather, is the work of fiction and autobiography. As a reader and lover of fiction creating this story involves an intuitive leap, as imagining divorcing parents within the structure and process of mediation allows me to illustrate the tensions and frustrations they both experience, and the particular part played by the 'best interests' of the child concept along the way.

I acknowledge that divorcing parents will often be in dispute on a broad range of matters, such as financial support of children and property distribution after marriage breakdown, and possibly more resistant to the mediator’s efforts than my fictional parents. I purposely decided to limit the areas of disagreement in this imagined scenario to disputes over ‘shared parenting’, a recent development in family law legislation with the 2006 amendments, requiring decision-makers to start by

considering, where practicable, 50:50 shared physical care of the child.18 This decision was a practical measure to contain within a limited word count a scenario that revealed particular insights relevant to my curiosity, that is, to highlight the interpersonal dynamics at work in mediation, and to emphasise how the mediator manages the potential for unruly emotions and outbursts from parents, and perhaps more significantly, the way in which divorcing parents co-operate in this restraint.

During the process of writing this story I found myself identifying with the mother, as someone who knows her child’s fears, capabilities and limitations. I will touch on this at the end of this chapter, and return to it in the conclusion to the thesis. For now, I highlight that through the writing process I became more sensitive to the way in which the notion of ‘gender-neutrality’, implicit in the concepts of ‘parental responsibility’ and ‘shared parenting’, can obscure how the mother, as the parent who is most often closely involved with the day to day needs of the child, may well have special knowledge and role in speaking for that child’s interests. With this in mind, I acknowledge that my heart is with the mother in this story as she struggles to steer the discussion towards the things she knows about her daughter, and what she considers to be relevant to her child’s best interests.

This story involves divorcing parents, Kate and Harry, who had been together for twenty years and were married for seven of those. They separated thirteen months ago. They have a daughter, Iris, who is seven years old, and have reached agreement on financial support for their child and property distribution, but have been unable to agree on the future parenting arrangements for Iris. They have recently made a joint application for a divorce order and initiated proceedings in the Family Court.19 In accordance with the requirements of the Family Law Act 1975 (FLA), the only method of proving ‘irretrievable breakdown’ is that they have lived separately and apart for a continuous period of not less than twelve months immediately preceding the date of the filing of the application for the divorce order, and there is no reasonable likelihood of resuming married life.20 The FLA also requires they negotiate and agree to a ‘parenting plan’ for their daughter Iris before they can finalise their divorce.21 They are

18 FLA s 65DAA
19 The Family Law Act 1975 (Cth) (FLA) introduced the single ground for divorce – irretrievable breakdown of marriage.
20 FLA s 48 and s 49
21 FLA s 55A(b)(i) and FLA s 63B
attending a community based family relationship centre in the hope that any outstanding issues can be resolved in mediation.

A story set in Perth, Western Australia, in 2014

Kate: Kate is thirty-seven years old. She completed a nursing degree when she finished school, and worked as a paediatric nurse for six years before giving birth to her daughter, Iris. She now works part-time at her mother’s plant nursery and is a fulltime mother to daughter Iris, who is seven years old. Kate and Harry started dating when they were seventeen years old, married in 2006 and separated in 2013. Iris lives with Kate in Fremantle, and visits her dad on the weekends he is not working – which, currently, is every third weekend.

Harry: Harry is thirty-seven years old. He is a diesel fitter and works two weeks on and one week off at a gold mine in the state’s north (fly in, fly out). He lives in Mandurah with his fiancé Joy, and their six months old baby daughter, Mia.

Iris: Iris is seven years old and lives with her mum, Kate, in Fremantle. Her maternal Grandparents, Auntie, Uncle and cousins live nearby. She attends the local primary school where she is in Year Two. She attends swimming lessons after school every Tuesday, and piano lessons after school every Thursday. She usually spends every third weekend with her dad.

Martin: Family dispute resolution practitioner/ mediator within a family relationship centre.

Pre-mediation separate meetings

Prior to the joint family dispute resolution mediation session, Kate and Harry attend an initial, separate meeting with their mediator Martin. As Martin explains, separate meetings give him the opportunity to meet them individually and discuss privately the issues that have brought them to mediation, while giving them the opportunity to ask questions and learn how the mediation process generally runs.

During the initial separate meeting with Harry, Martin discovers that Harry is requesting an equal shared parenting arrangement whereby Iris will live with him in Mandurah for half of every week, and every second weekend, including periods when
Harry will be away at work. Harry explains to Martin that he has recently become engaged to Joy, and they have a baby daughter, Mia. Joy is also keen for Iris to live with them on a more regular basis. Harry wants to be more active in Iris's life, and believes that having her live with them will be good for Iris as she will feel an important part of their family.

In the separate meeting with Kate, Martin discovers that Kate is concerned about the strain this type of regular, long distance commitment will place on Iris. Kate wants to leave things as they are – where Iris stays with Harry on the weekends he is home – to give Iris a chance to get to know Harry's fiancée Joy better. Kate cannot understand why Harry would want Iris to stay in Mandurah while he is working away. Kate is worried about how Iris will get to school in Fremantle from Mandurah on the days she is with Harry, and how she will cope with the early mornings, and all the travelling. Kate is particularly worried about how Iris will cope without her mum or dad when she is left in the care of Joy while Harry is up north working for two weeks at a time.

Martin reassures Kate and Harry separately that he appreciates their concerns. He then asks them both individually to consider what the downside of failing to fix the issues of disagreement between them will be, and suggests they both bring a photo of their daughter Iris to the joint mediation session, as it will help them to focus on her. Finally, Martin asks if either of them feel uncomfortable arriving together, and whether they would prefer to stagger their arrival times, and sit in different waiting areas. He then gives them his email address and tells them that if they have any further questions to contact him.

The mediation in process

Kate and Harry arrive separately at the agency and find their way to the reception area. Their mediator, Martin, arrives to greet them carrying some files and papers under his arm and wearing casual shorts and a t-shirt. Kate is initially surprised at Martin's casual attire as she expected him to be dressed more formally.

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22 FLA s 60CA Child’s best interests paramount consideration in making a parenting order. In deciding whether to make a particular parenting order in relation to a child, a court must regard the best interests of the child as the paramount consideration.
Martin: Hi Kate. Hi Harry. Come on in. Would you like a cup of tea or coffee, or perhaps a glass of water?

Kate and Harry both ask for some water and follow Martin into the meeting room.

There is a round coffee table, and three chairs, all facing inwards around the low table. There are no obvious signs where they should sit. All the chairs look exactly the same. Martin asks them to take a seat and disappears through another door and they hear the tap running.

There are brochures on the coffee table titled 'Resolving Conflicts in Family Law'. Kate picks one up and on the first page reads:

Focus not on whatever conflict you have with the other parent. Focus on your child, your children, and what's in their best interest.

Martin comes through with their water, jogs back to the kitchen to grab his files and comes back and sits down. He puts his files and papers on the table, looks up and gives them both a welcoming smile.

**Mediator’s opening statement**

Martin: First of all Kate and Harry, welcome. Thanks for coming in today. It was really helpful to meet you both individually yesterday and to get an idea of what you are both hoping to get out of today’s session. I know I touched on this yesterday when I met you separately, but as I now have you both together I just want to spend the first few minutes to help you understand my role here today as your mediator, and go over how this process works.

This is your day. Today you have control, so I would encourage you both to make the most of it. There may be times when you feel like getting up and leaving, but I encourage you to stay in the room as today is an opportunity for you both to work towards an agreement that will work for Iris, and work for you as her parents.

Okay, let me explain what will happen. My role is to be an impartial guide. I will listen to what your concerns are, and together we will work out what issues you need to focus on to reach an agreement acceptable to the court. If I think you are drifting too far away from the relevant issues I may remind you
to stay on track, but apart from that it will be up to the both of you. We can take a break whenever you like, so if you feel you are getting upset or just need a break let me know.

I will start by asking both of you to tell me what brought you here today. It is important that you now hear each other’s concerns face to face, and that you listen to each other without interruption. You will both get the opportunity to talk so I would like you both to listen to what each other is saying. I will take some notes while you are talking, and encourage you to do the same, rather than interrupting. You will both have an opportunity to put your perspective forward, so listen to each other and try to remain open to the other person’s perspective. After you have both spoken I will summarise my notes and read them back to you to see if I have got all the relevant issues down.

If you both agree that I have summarised all of your concerns properly then we can create an agenda and put it up on the white board. That way we can all clearly see why we are here today, and it will also help to keep you focused on the matters we are here to negotiate. We will talk, have a break if you need it, and work our way through the issues to the solutions. Once we are agreed on the solutions we can write up an agreement and that could all happen today. In my experience, the majority of parents who come to mediation manage to reach an agreement.

If we work this out today, which I am very hopeful we can, then we can reassure Iris that you both have her best interest at heart – which I’m sure she knows already. I asked you both to bring in a photo of Iris – have you got them?

Kate and Harry both take out their photos and Martin takes them to have a look.

Martin: She certainly looks like a happy little girl. It looks like she enjoys the ocean as it features in both of these photos – does she like swimming?

Kate tells Martin that Iris loves anything to do with water, and Harry makes a joke that she may have webbed feet, as she would spend all day in the water if she could.

Martin places the photos in the centre of the table facing out to Kate and Harry.
Martin: I know you both realise how important it is that we think about Iris and what is best for her, and that is why you are here today. We need to think of Iris as the fourth person in the room, and her photo will remind us of that, and occasionally I may advocate for her, to bring her best interests into the room with us. As I told you yesterday, everything we say in this room is confidential, and, if you are unable to reach an agreement today, and decide to go to court, you cannot use anything we have discussed here in court. I am sure it won’t come to that.

Now there are only two rules that I would like you to agree to today. (Martin smiles and relaxes back into his chair). The first, as I have already mentioned, is not to interrupt when the other person is talking, and the second, is not to put the other person down, shout at them or ridicule them. Respect each other. You are both Iris’s parents, and you are here today for her. Remember we are here today to work out a way forward that is best for Iris, and I know from talking to you both yesterday that she is extremely important to both of you. If there is anything you feel uncomfortable talking about in front of the other, or if you feel the need for confidentiality, then we can always have a private meeting, though I encourage you both to be completely open and honest with each other.

We’ll start off by giving each of you the opportunity to outline the issues that have brought you here today. You will both be given ample opportunity to speak. As I have already mentioned, you can take notes as we go and then you will have an opportunity to discuss them when the other person has finished talking. Please be polite to one another as today is all about open communication and courtesy while we work together to negotiate a way forward.

**Party initial statements**

Martin: If everything sounds fine, then we can start.

Kate and Harry both nod.

Martin: Okay Harry, as you arranged for Kate and yourself to come today how about you start by telling Kate what has brought you here today. Kate, if Harry does
say something that you feel you want to respond to then write it down and
you can mention it when it is your turn to speak.

You can start whenever you feel ready Harry.

Harry: Where do I begin? *(Harry leans forward in his chair and rubs his face).* Okay. I
always feel that what I want for Iris is seen as less important than what Kate
wants for her. I’m her dad, and I want her to be a part of my life as well. Just
because Kate and I are getting divorced shouldn't stop me from being Iris's
dad. I want Iris to live with me in Mandurah for half of the week, and every
second weekend. I know that I have to go away regularly to work
unfortunately, but I still believe that Iris will get more out of being a part of a
family, with a little sister, than if we only saw each other every third weekend.
Iris loves coming to stay with us. Joy is keen for Iris to feel a part of our family
as well, and is happy to take care of her when I’m working, you know, take her
to school, swimming, whatever. My parents are keen to help out as well, and
they only live half an hour away from us. They miss Iris – they don’t get to see
her much either. I think it is really important for Iris to feel that she belongs in
our family. Joy’s a great mum, and Iris seems to really like her. I just want to be
her dad. I remember reading somewhere that it’s been proven by some
research that kids need their dad in their lives – even girls need a male role
model, and separation shouldn't affect that. Isn’t there some rule about that
now? Haven’t I got some rights as her father? Haven’t my mum and dad got
some rights to see her more often as well?

Harry addresses this last question to Martin.

Martin: We can talk about the legal issues later on Harry. Let's focus on what you have
said so far at this stage. Can I just clarify your work situation?

Harry: I work up north and fly up for two weeks, and then I’m home for one week, but
Joy is home with our baby Mia and wants Iris to be able to stay whether I’m
there or not. I have to work, I wish I didn't have to but all dads do. My parents
will help when they can. There are a lot of families where the dad has to go
away to work. Let’s not forget that if I wasn’t working and earning good
money then Kate wouldn't be getting a penny from me either. *(Harry sits back
in his chair and shakes his head).*
Martin: To clarify your current situation, you work away for two weeks and you are home for one week. You live with Joy and your baby daughter Mia in Mandurah, and you would like Iris to spend regular time with you – that being half of every week and every second weekend, even while you are working away. Your partner Joy is happy for Iris to come and stay and will take care of her when you are away, with some support from your parents. When you are away it will be Joy, Mia and Iris at home. Will there be anyone else living in the house?

Harry: Yeah, that’s right. Basically I just want Iris to be a part of our family more often than every fourth weekend. I don’t want her to think that I’ve abandoned her, or that I don’t love her. I know that Kate is worried that living between two homes will confuse Iris, but I think it will make her feel more secure knowing that she has two families that she belongs to. Lots of kids live like this these days – between two homes – it’s not that unusual anymore. We’ve just bought a new house and I’ve painted Iris’s bedroom her favourite colour. We’re going to get a puppy. We’ve got lots of young kids in our street. We live near the beach. Iris loves swimming. My parents live reasonably close. Iris will love it. Ah, and yeah, only us living in the house, nobody else.

Martin: Okay, thanks for all of that information Harry. I appreciate your openness and input. Can I just clarify the points you have made?

You want Iris to spend more time with you, Joy and Mia in Mandurah. You suggest half of every week, including every second weekend.

You work away for two weeks, with one week at home, so you will not be there all the time.

Your fiancé Joy, with some support from paternal Grandparents, will take care of Iris in your absence and take her to school and any other commitments she will have to get to while she is living in Mandurah.

Is there anything else?

Harry: No that’s it really. I just want Iris to know that she is an important part of our family. I want her to know how important she is to me, and the rest of my family. I want her to know that I will do anything for her and will always be there for her. I am her dad after all. I want to take her on holidays, take her
camping, have birthday parties for her, and have her wake up in my house on Christmas morning. I just want to be a regular dad.

Martin: Thanks for that Harry. We will get back to the detail after we have listened to Kate’s concerns. Kate can you tell us what brought you here today?

Kate: *(Kate shuffles forward in her chair, crosses her legs and looks at the floor)*. Of course I want what's best for Iris. That is the most important thing. I don't want her to grow up with any issues about her mum and dad's divorce. I will do anything to avoid that. I want her to have as normal a childhood as possible. *(Kate looks straight at Harry)*. I know we can't change the fact that we have messed up our marriage, but hopefully we can make sure we don't mess up Iris's future. That's why I'm here today – to try to make sure that she has a happy and safe childhood despite the fact that her parents are no longer together. Our mistakes shouldn't have to affect her more than they have to.

Kate wipes her eyes and is looking agitated. Martin tells her to take her time.

Kate turns to Martin.

Kate: Of course I want Iris to spend time with her dad, but if he is working away then I don't see the point of her being there. I don't think it's fair of Harry to expect Iris to stay in Mandurah when he isn't even there. Joy isn't her mother. Iris likes living with me, I am her Mum. She likes a quiet life; she likes her garden, her dog, her friends, her Grandparents and cousins who all live nearby. Her home is in Fremantle, not Mandurah. What happens to her when she is so far away from home living with Joy, someone she hardly knows, and a newborn baby? How will she get to and from school, swimming lessons, and other local activities she is involved in when we live so far away from where Harry has chosen to buy a house? How early will she have to get up in the morning to get to school, which is over 70 kilometres away? She is only seven years old! I think Harry loves the idea of a big happy family, but hasn't thought through the logistics of it all, or how it really will be for Iris. Is this the best thing for Iris, or is it the best thing for Harry?

Harry is looking annoyed and leans forward.

Harry: Yeah Kate, is that because you're the only person who knows anything about being a parent. Give me a break.
Martin: I will ask you not to interrupt Harry, just make a note of anything that comes up that you feel you would like to respond to. Is there anything else you would like to add Kate, or would you like to stop for a few minutes?

Kate leans towards Harry.

Kate: Joy is only 24 and has just had a baby Harry, and you expect her to become ‘Mother of the Year’ overnight! And more importantly for me, what about Iris – what kind of attention will she get? I think she will get overwhelmed and frightened without her mummy or daddy there for her? She’s only seven years old and I’m her mother. I know her so well. I know what frightens her. I know what she is feeling just by looking at her. I know her. Joy isn’t her mother. She hardly knows Iris. She is only a kid herself and you want her to take my place! You just want me to become Iris’s mum part-time and let someone else take over. I haven’t even met Joy, and I know nothing about her. This is a nightmare.

Kate is upset and starts to cry.

Harry: *(Harry leans towards Kate and points his finger at her).* You are so selfish Kate. All you think about is yourself. What about me! Why can’t you see things from my perspective for once!

Martin: Is there anything else you would like to add Kate, or would you like to stop for a few minutes?

Kate: I’m okay. *(Kate wipes her eyes with a tissue from the box on the table).* That’s it really. Iris has a happy life, despite the fact that we are no longer together. She wouldn’t be happy living half the week in Mandurah with Joy pretending to be her mum. She likes living with me, and I know that sounds presumptive but it’s not – it’s just the way she is. It is so difficult to tell you what I know about what is best for Iris without it sounding selfish. I know her so well. I’m her Mother and I know her. I can’t explain how that works, and I know it sounds like I’m cancelling you out Harry, but I’m not. I’m trying to tell you that Iris loves you, loves being with you, but is better off living with me, in her home, near her friends. I’ve *always* looked after her. I’ve *always* been there for her. I know her so well. I’m her mum – why do you want to change that!
Harry: Are you saying that I don't know my own daughter? Are you saying that I don't have her best interest at heart? Come on Kate – don't try to make out like I've never been there for Iris!

Harry is leaning forward and is very agitated.

Martin: Thank you for your patience Harry. I appreciate that issues will come up that you will want to disagree with or discuss further, but if we can just get the main issues on the table then we can go on from there. Thanks Harry. Okay Kate, is there anything else you want to say?

Kate: Just that I know Iris has to spend time with her dad. I'm just trying to do the right thing for Iris. I don't think it is fair that Harry makes all of these choices and then expects everyone else to adapt to them. He chose to buy a house in Mandurah, he chose to work away, he chose to move in with Joy and have a baby, and now he has decided that Iris has to adjust to his new life! He wants all of the choice and I'm made to feel like a bitter ex-wife if I don't agree. I just want to be able to stand up for Iris and I think it is unfair of Harry to expect her to jump on to his crazy train and think it's going to be a fun ride! I don't feel he is even listening to me.

Kate wipes her eyes and looks out of the window away from Harry.

Martin: Okay, thanks for being open and honest with us Kate. If I can just clarify the points you have made:

You want Iris to spend regular time with Harry.

You are concerned that Iris will not cope with living in Mandurah for half of every week.

You are concerned about how Iris will feel being in Mandurah with Joy and baby Mia when Harry is working away.

You have concerns about how Joy will care for Iris as well as her new baby.

You are concerned about the distance Iris will have to travel from Mandurah to Fremantle to get to and from school as well as her other activities.

Do you think that is a fair enough summary of the issues?
Kate: Yes, they are my concerns. I just want Iris to feel secure and I don’t think being forced to go to Mandurah and travel so far to school is what is best for her. If Harry wanted Iris to live with him so much why didn’t he move closer to her school and friends?

Harry rolls his eyes and groans.

Martin: Thanks Kate. Thanks Harry. I think we can move on to clarifying the points we need to focus on now.

**Definition of the problem**

Martin: Harry, you want Iris to have regular times with you and your family, including your parents. It is important to you that Iris feels a part of your family, and this is why you want to have a regular commitment to have Iris live with you for half of the week, every week, and every second weekend.

Kate you also want Iris to have regular contact with Harry. You have concerns about the times that Harry is not there – the weeks that he is working away – and how Iris will feel about Harry not being there. You are also concerned about how Iris will get to and from school, and other activities, the distance she will have to travel to get there, and how Joy will manage the situation with the demands of a young baby.

Have I got everything?

Harry: Yes, that is the sum of it I suppose.

Kate: Yes, that is right except I suppose by ‘regular contact’ I don’t mean the same thing as Harry.

Martin: Can you tell us what you mean Kate?

Kate: I think things are really good as they are. Iris spends regular time with Harry and she enjoys it, but a regular commitment to being in Mandurah when Harry isn’t even there is asking far too much of her. She will be confused and scared. I think Harry should be thinking of this from Iris’s perspective rather than from his own. He’s trying to build a new family on his own terms. That’s the point isn’t it? *(Kate addresses this question to Harry).*
**Harry:** *(Harry leans forward and spreads his hands open)*. I just want to spend more time with my daughter. And yes, I do want to give her the opportunity to get to know her little sister and to spend time with Joy – we’re a family, and I want Iris to be a part of our family. I’m her dad. I just want to be allowed to be her dad – the last thing I want is for Iris to think that Mia has taken her place. I love both of my little girls and I want to be there whenever they need me. I want Iris to feel safe and secure, and I think that being there for her as much as I can is really important.

**Kate:** But that’s the point Harry, you won’t be there most of the time and she won’t feel safe and secure! I’ve always looked after Iris – she is my priority. I’m there for her *all of the time*. It’s me that has made the adjustments, not you. You have always worked fulltime, and you have been able to because I’ve been there to look after Iris. We decided before Iris was born that I would give up nursing and work part-time at my mum’s plant nursery because it fits in with being Iris’s mum – and being Iris’s mum is what I love more than anything. You have worked up north for most of Iris’s life, and while I appreciate that this has probably been necessary, it has also meant that I have been the most constant person in Iris’s life.

Harry leans back in his chair and sighs loudly. He runs his hands across his face and says under his breath ‘here we go, I can’t win’.

**Kate:** You can’t make a perfect new family by dragging Iris away from me. You can’t jeopardise Iris’s happiness just to ensure your own.

Harry mutters something about Kate being a control freak.

**Kate turns to Martin.**

**Kate:** He will only be happy when I agree to everything he wants. He has absolutely *no understanding* of my concerns at all. I cannot agree to Iris being at Harry’s place while he is working away. I just don’t see the point. And what about Joy – she has just had a baby and she is very young. I don’t really know how Iris feels about her. I don’t even know whether Joy likes Iris. I don’t even know Joy!

Harry sighs heavily and shakes his head, slides down further into his chair and looks up at the ceiling.
Kate takes a deep breath, shakes her head as well and looks out of the window.

Kate:  *(Kate turns back and says defiantly).* I’m Iris’s mum, not Joy!

Harry groans and says ‘here we go’!

Martin: Okay, thanks Kate. Thanks Harry. I understand that you both have concerns about Iris’s welfare but there is also a lot of common ground between what you both want for Iris. I suggest we focus on this for a moment and get something down on paper and then we can work on the areas that you are both unsure of. When I look at my notes I can already see that you have some common ground.

Martin focuses on his notes and quietly reads through them for a few minutes before continuing. Kate has a sip of her water and looks at her watch. Harry folds his arms and sits back looking at the window.

Martin: Okay, we can definitely agree that Iris is very important to both of you, and you both love her very much. You both agree that it is important for Iris to spend time with both of you, and that Iris’s welfare is your priority – so that is fantastic. That is the focus we want to maintain as we work towards the best possible outcome for Iris in all of this. You are apart on some things but you agree on some things. We can create an agenda for the next stage of discussions from these notes. I will write it on the whiteboard where we can see clearly what we are working towards, and where we need to discuss the detail a bit further.

Martin writes the list on the white board, and Harry and Kate both agree that these are the issues they want to negotiate.

**AGENDA**

How much time should Iris spend with mum and dad (in the short term and the long term)?

How will Iris get to and from school, and other activities, when she is staying in Mandurah?

How will Iris cope with the extra travel and early mornings travelling 70 kilometres between Mandurah and Fremantle to get to school?
How will Joy manage the regular travel between Mandurah and Fremantle that is required to get Iris to school, and other activities, when Harry is away?

How can Iris's experience of spending time with her mum and her dad be a positive one?

**Discussion and exploration of the issues**

Martin: You both agree that it is important for Iris to spend time with her mum and her dad, the question just seems to be how much time.

Okay Kate, would you like to share your thoughts on the matter?

Kate: I can understand why Harry wants Iris to spend more time with him, but I just wonder whether it is the best thing for Iris. It is difficult to make Harry understand that I only want what is best for Iris. I want to make the critical point that even if Harry was around all of the time Iris would still find living half of the week at his house in Mandurah – each and every week – really, really difficult. It will put a lot of pressure on her. She is a very quiet girl, and she is already worried about all of this. She doesn’t want to go, but she doesn’t want to upset Harry. How can I explain how Iris feels about all of this without it sounding as if I’m putting words into her mouth? I’m not. I’m just trying to protect her. Why can’t she just stay with Harry on the weekends and holidays when he is actually there?

Harry: Oh please Kate! *(Harry is starting to raise his voice and is leaning forward, staring directly at Kate. His face is red and he is breathing heavier).* Why don’t you just admit that it’s you who doesn’t want Iris to leave you! I know that Iris wants to come and stay with me, she even told me that. And I want her there, so what’s the problem Kate! Iris feels guilty and won’t tell you because she doesn’t want to upset you Kate, not me! Don’t you think it’s better for Iris to have a normal relationship with her dad? Do you want to tell her when she’s older that you stopped her from living with me, even though she wanted to? You treat her like a baby Kate. You want everything your own way as usual?

Harry is starting to get louder and is getting agitated.
Martin:  Thank you for your comments Harry. I’d appreciate it if you lowered your voice. Would you like to take a break?

Harry:  No, I don’t need a break. I just don’t like the way Kate makes all the decisions for Iris and I get no say. I know Iris wants to come and stay with me and I get upset that Kate thinks she knows better.

Kate:  *(Kate leans forward and looks straight at Harry)*. Listen Harry! Listen! I think I do know better. I’ve been there for her pretty much 24/7 since she was born. Don’t you think you’re putting a lot of pressure on her to keep you happy? Just imagine for one second you were seven years old and living with a stranger and having to get up early, and then drive for nearly an hour to get to school, just to live in a house without your mum, and a lot of the time without your dad. It is not a good idea! You have this idea of a shiny new family and you want Iris to fit into it. You are trying to make your new family the main one and you’re trying to push me out of the way! You won’t even listen when I try to tell you that Iris is worrying about all of this. How can you honestly expect her to stay there when you are not even there – when you are thousands of kilometres away at work? She is not one of your possessions Harry – you can’t just press a button and turn her on and off! She is just a little girl, and she is really worried about upsetting you. Listen to me Harry! I’m trying to make you understand that Iris is worried!

Kate grabs a tissue and looks down and wipes her eyes.

Martin:  Okay, thanks Kate and Harry. If you would like to take a break just let me know. I know how difficult this can be and I appreciate your openness and honesty. I realise this is an emotional time, but you are both doing really well in exploring the issues. If it is okay with you I think we can move on to considering what will work for Iris. If we look at the list we have written up on the board and remind ourselves what we need to stay focused on, and then generate some options for a positive outcome, I think we can move closer to working out an agreement.
Generation of options, negotiation and problem solving

Martin: Harry you got to speak first earlier, so Kate you can choose the first topic that we discuss.

Kate: *(Kate glances up at the list on the board)*. The big question is how much time Iris spends with each of us. As I've already said, I think the best outcome for Iris would be for things to stay the same. I'm worried that she will get absolutely exhausted travelling up and down between Mandurah and Fremantle to get to school by 8.30 every morning. I'm also against Iris staying in Mandurah with Joy while Harry is working away. What is the point of her being at Harry's house if he isn't even there? This is not thinking about what is best for Iris at all.

Harry: And you are the only person who knows what is best for Iris, aren't you Kate.

Martin: You are not alone in working through these kinds of matters. Most parents we see in mediation come to us with similar concerns and I find it usually works best if we look at the situation through the child's eyes and think about what Iris would want. I have some brochures on child development here that are very useful for understanding the types of situations that Iris may find difficult at her age. They outline developmental guidelines for different stages of a child's life and include a number of insights into how seven year olds manage change.

Martin opens a file and takes out a couple of brochures and hands one each to Kate and Harry to read.

Martin: I mention this here as I feel we need to remember that Iris won't always be seven years old and will grow and change as she moves into other stages of her life. She will be better able to manage new living arrangements and travelling further as she gets older. Maybe at this stage, as she is only seven years old, the focus could be on developing a way that spending time with both of you is a relatively easy process for her. Taking it in stages may be the better option for Iris at this age. It will give her time to get use to the new situation, and show her that you are both working together to support her.
It is also important to acknowledge that if you can't reach an agreement in mediation, and you end up in the Family Court, the court will make all the decisions for you.

Now Harry, tell me what your thoughts are on how much time Iris spends with each of you. Take a look at the brochure and think about what we know about child development and what is best for Iris at this stage.

Harry and Kate both start to read the brochures.

Child Development 6 – 9 years:

At this age, children are often very excited by and genuinely interested in the outside world. Your child will be able to absorb information with enthusiasm and frequently remember remarkable detail about subjects that interest her.

Your child's thinking processes are subject to her emotions and self-esteem. If she's worried or unhappy, she won't be able to concentrate or 'think properly', and generally won't have the strength to overcome this until her worries are sorted out.

Similarly, if your child's self-esteem is low he might be reluctant to try new tasks in case he fails. Cognitive development in these years has a lot to do with feeling settled and supported to try new things to extend himself (Child and Youth Health, 2012).

Harry: Look, I've said it before – it's really important to me that Iris feels an important part of our family. I can't see the big deal about this, but if the court will want us to take it slowly then I don't have a choice do I? I don't want to end up paying a heap of money to have a lawyer tell me the same thing. I don't want to end up in court being told the same thing. I don't want to drag my personal life through court and pay someone a heap of money just to be told everything that you're already telling us. I suppose I'll have to be happy with Iris coming for the week I'm home for now. Not half the week, or just the weekend, but the whole week and weekend. At least that is a lot better than just coming for the weekend, which is what has been happening up until now.

Martin: Thanks for that Harry. Kate, how do you feel about Harry's suggestion that Iris stay with him in Mandurah during his week off and see how it goes?
Kate: I’m not happy about it, but I imagine that the court will probably think this is fair. I would like it to be flexible. I don’t want to force Iris to go if she doesn’t want to go. I will be worried about the impact of a whole week of early mornings and the travelling on Iris. I really want it to be a trial for her, without any pressure from Harry. I think she will find it too exhausting. I don’t think it’s a good idea at all, but I don’t want to end up in court and be told she has to go anyway, or worse. Harry knows that I can’t afford to go to court, and, anyway, I definitely don’t want Iris involved in us fighting over her in court.

Martin: Okay Kate, thanks for that. What about something like this then: Iris is to go to Harry’s house in Mandurah every third week, being the week Harry is home, for a trial period of three-months. If after three-months there are any concerns about Iris’s welfare then we can arrange another mediation session and work through these concerns together. If there are no problems, and Iris is coping well with the situation, then it will continue. It is important to remind ourselves here of the expert literature we have about child development. (Martin reaches into his file for another document on child development and passes a copy to Kate and Harry). The guidelines show that spending regular time with her dad could be a good thing for Iris in the long term, though of course we wouldn’t want to persist with it if it was having a negative effect on her.

Kate: If Iris spends the week that Harry has off with him, and he is able to get her to and from school, and the other commitments she has, and, if Iris can manage then I suppose I will have to agree. I’d like to know that Harry’s parents were helping and supporting Iris as well, until she feels comfortable with all of this change in her life. I think she will be exhausted by the end of week. I’m worried that it will be too much for her, but I don’t feel that I can stop it from happening. I suppose I just have to be happy that we can agree for Iris’s sake, and every third week is better than every week. I don’t want her to feel that we are pulling her in different directions.

Harry: Okay, I’ll agree to a three-month trial, but I don’t want Kate to stop it just because she thinks she can. I’m happy to give it a go, though I don’t want it to only be one week forever. This set-up will give Iris time to adjust to living in Mandurah, get to know Joy and Mia better, and then we can see where we go
from there. Is it possible to agree to this now but not be locked into just one week forever?

Martin: This agreement will be a guideline for your future arrangements about Iris. If you want to change anything – and you both agree to these changes informally – then you can go ahead and adapt it to suit you both. If, for any reason, you want to make a more formal change to the agreement, or if you cannot agree, then you will need to come back and have it formally noted.

Final decision-making, recording and closure

Martin: We'll get the parenting plan documents written up and you can both take it to your lawyer, or whoever is advising you, to have a look and approve it. They may want to re-draft it into a tighter form. Today you will sign this agreement as an indication of what you have agreed to. I’ll go through it with you and give you both a copy.

The mediator, together with Harry and Kate, spend some time writing up a draft parenting plan for Iris.

Commendation and concluding remarks

Martin: It’s great to see you working this out together. I want to congratulate you both on keeping in mind Iris's best interests throughout this process, and encourage you both to always keep that at the foreground of any decisions you will be making in the future. You have both made a commitment to Iris here today, and it is wonderful to see parents being so responsible, and putting their children’s best interests first and foremost in their lives.

Congratulations Kate and Harry *(Martin shakes their hands)* and best of luck to the three of you in the future.

The Parenting Plan will now be scrutinised by their lawyers and submitted to the Family Court. If the family court magistrate is satisfied then divorce proceedings will continue. For the next three months Kate and Harry will trial the parenting plan agreement.
Kate’s reflections

As they leave the Family Relationship Centre, Harry stops off at reception to collect contact details for lawyers who are able to scrutinise his parenting plan before he lodges it with the court. Kate heads out to the car park, her thoughts rattling around in her head.

Kate: How was it that Iris kind of disappeared from the room? She wasn’t there. We could have been talking about any child at the same age. Almost like she was an object, a focus, to be discussed rationally and dealt with as part of an official agenda. Why, she thinks, walking faster, couldn’t I get across what she was like? Why did I behave so well; why was I so controlled when I felt to frustrated and unsettled. It’s like I was being a good mother, a reasonable sort of person, by talking about it all so rationally.

Kate fiddles with her keys, and shakes her head.

Kate: It’s odd, because Martin was reasonable enough; it wasn’t as though he just took Harry’s side. All the same though, he had a cheek, didn’t he; like he could tell me what was best for Iris when he hasn’t even met her. And he never acknowledged that I was the one that looked after Iris when it suited Harry to move out. And he kept talking about us as parents. Well, of course I get that, but it’s not how I think about myself, because first I’m her mother, and surely that is what counts. Or doesn’t it anymore?

Kate stands by her car and bangs the roof.

Kate: The thing is, I think I’ve gone and let my little girl down; I’ve been so anxious to be responsible and good that I’ve been afraid to buck the system and say what I really feel, what I really think.
Chapter Two

Family, Law and the State: The Historical Foundations

To understand how we have come to be at a place where the majority of people who commence proceedings in the family court reach agreement without the need for a trial, we firstly need to understand the evolution of family law in Australia. Modern family law in Australia can only be understood in its historical context, and, as we inherited our law from England the story begins there. Over time these laws have grown and developed into an area of family law that not only regulates marriage and divorce, but also encompasses varied areas of family life. In this chapter I cover the history of marriage and divorce, including an overview of the social factors bearing on this long history.

The history of marriage and divorce

Up until the fourth century, throughout Europe, marriage and the dissolution of marriage were matters of custom not law; they were purely secular matters and the only essential requirement was the parties ‘consent’. This consent could be withdrawn at anytime by either of the parties to dissolve the marriage and no ratification from any outside authority was required (Parkinson & Behrens, 2004). The only sanctions on the withdrawal of consent related to the economic wellbeing of the family. The wife and any children of the marriage had to be suitably provided for by the husband until “the wife went with another man who then became responsible for her” (Young et al., 2013, p. 2).

Following the integration of the Catholic Church into the Roman Empire in the fourth century, canon law – which was based on scripture – became strongly influenced by Roman law (civil law). Marriage remained a private affair and was regarded as of little interest to others, being formed by the exchange of consents. By about the seventh century the Roman Catholic Church was beginning to take more of an interest in marriage. This was considered a logical extension of its warfare against ‘sins of the
flesh’ (Young et al., 2013, p. 2). By the twelfth century, the law regulating marriage in England was the canon law of the Catholic Church, and according to canon law, marriage was a sacrament and therefore indissoluble. Marriage was now firmly established in England as an ecclesiastical matter, and remained that way until the English Reformation of the sixteenth century.

The English Reformation isolated English ecclesiastical law from that of Rome and subordinated it to the authority of the state – that is the King and the ordinary law of the land. The severing of the connection with the Roman Catholic Church led to the secularisation of English ecclesiastical law, in other words, “it ceased to be Church law in any strict sense and became increasingly part of the general law of the country” (Dickey, 2002, p. 7). Domestic law in England at this time was made up of three different legal systems – canon law, equity law, and common law, and all three had some claim to authority over the laws of marriage, separation and divorce (Stone, 1990, p. 25). From this time on, marriage was no longer considered a sacrament, though it remained a spiritual act and therefore indissoluble. It was however possible for some people to obtain a decree of divorce, a mensa et thoro (literally a divorce ‘from table and marriage bed’), which was granted on two grounds: adultery and marital cruelty. This was not a divorce in the modern sense of the term, but a form of judicial separation (Dickey, 2002, p. 11). The costs involved in obtaining a judicial separation meant that it was only possible for the wealthy, and rarely for women.23 It did not dissolve a valid marriage but relieved parties to a marriage of their obligation to live together as man and wife, in other words they could live apart but were unable to remarry during the lifetime of the other. This denial of the legal right to remarry was problematic for men of property as they were unable to remarry and produce a legal heir to pass on their estates and titles. Other avenues for separation gradually became available to the wealthy, such as the ‘doctrine of nullity of marriage’, which denied that a valid marriage had ever arisen by reason of some existing impediment. These impediments could include “a fairly distant family relationship” between the married

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23 The husband acquired the right to control and manage his wife’s freehold land, in which he took a life interest if she predeceased him and there was a child of the marriage. Because of this women could rarely afford divorce (Finlay & Bissett-Johnson, 1972, p. 4).
couple or sexual relations between one of the parties of the marriage and “a near relative of the other” (Young & Monahan, 2009, p. 4).24

After 1697 the House of Lords could be petitioned to grant a divorce by a private Act of Parliament making it possible for wealthy men (and a very small number of women) to obtain a divorce.25 As Young and Monahan (2009, p. 5) tell us, to get a Parliamentary divorce was a very ‘male-centred’ threefold procedure, involving the ecclesiastical courts, the common law courts and the House of Lords:

First, a divorce a mensa et thoro had to be obtained from the ecclesiastical court. To achieve this it was necessary, first, to be able to identify an adulterer (the basis for the divorce). This was not always an easy matter. The next step was to sue that person for damages in the common law courts. (...) Once these two steps had been completed the plaintiff could petition the House of Lords for a divorce a vinculo.

The male-centred nature of the divorce process meant that women were neglected by law as it related to marriage. Their position within a marriage was one of economic dependency or economic liability, and if a man wanted to be rid of his wife there were remedies available to him, including ‘wife sale’, ‘disappearance’ and ‘living in sin’ (Young & Monahan, 2009, p. 6). This double standard within the law not only excluded women from access to divorce, it also excluded the poor due to the high costs involved.

It was not until the eighteenth century that marriage started to become legislated in England with the introduction of the first Marriage Act in 1753. Lord Hardwicke’s Act of 1753 was designed to prevent clandestine marriages and could be described as “the most restrictive marriage law ever to apply in England” (McDonald, 1975, p. 4). It was initiated against concerns about property and inheritance amongst the landowning gentry and merchant class. Hardwicke’s Act transformed marriage law by creating an “inflexible definition of marriage” with essential characteristics (Parker, 1990, p. 47).

24 As Young and Monahan (2009, p. 4) point out, a prominent example of the use of the device of nullity was Henry VIII who used it in the course of his marital adventures.

25 In the years during which parliamentary divorce was available, in all something like 300 such divorces were granted by parliament. Of these, all but four were granted to men (Young & Monahan, 2009, p. 6).
Clandestine marriage and Lord Hardwicke’s *Marriage Act 1753*

Changes in the economy in the mid-eighteenth century shifted the means of production in society from land ownership to a growing merchant and trade sector. This meant that marriage between landowning families and merchant and trade sector families had the potential to create a crucial alliance for issues of inheritance. All children of the gentry and landowning classes were strategically useful as “younger sons could attract merchants’ daughters, and vice versa”, creating an alliance of different types of capital (Parker, 1990, p. 33). Marriage and death were the two significant life events upon which inheritance matters rested, and it was crucial that children from these families married well as the future prosperity of their families depended on it (Parker, 1990, p. 31).

It was at this time that clandestine marriages began causing problems for many elite families whose children had secretly married “rapacious fortune-hunters” or “pretty but penniless maid-servants” (Stone, 1990, p. 124). Clandestine marriages were binding but illegal marriages carried out without parental consent, and they triggered the first Marriage Act in eighteenth century England: Lord Hardwicke’s *Marriage Act 1753*; entitled ‘An Act for the better preventing of clandestine marriages’ (Parker, 1990, p. 29). Hardwicke recognised that under existing conditions there was no way to effectively stop clandestine marriage, despite the fact that they were illegal according to canon law. What this Act could do was make it difficult, if not impossible, for marriages to occur without parental consent, thereby giving families greater control over monitoring and sanctioning their children’s marriages. As Stone (1990) describes it, Hardwicke’s Act implemented a process whereby marriages were deemed null and void if not preceded by banns or an official licence; had not been carried out publicly in a church or chapel; had occurred without parental consent for anyone under the age of twenty-one; or, were by mere verbal or written contract. From now on, all marriages had to be “recorded in a parish register and signed by the bride, groom, and at least two witnesses, and the officiating clergyman”, and then “sent to the bishop annually for safekeeping” (Stone, 1990, p. 124). In an effort to make the “penalties so severe” as to put an end to clandestine marriage, the Act included the “ferocious clause” that the act of conducting a clandestine marriage could be punishable by death, though, this was later amended to transportation to fourteen years. Tampering with the parish register was also punishable by death (Stone, 1990, pp. 123-124).
Hardwicke’s Act enabled a more regulated approach to marriage and divorce, and created an opportunity for the state to control an area of social life considered important for issues of legitimacy, property and inheritance. It transformed marriage law by creating a definition of legal marriage that stipulated that the status of marriage could only be acquired by adherence to the requisite formalities of the Church of England (Parker, 1990). As such, it followed that de facto marriage was not given legal recognition. The legislation only appealed to people to whom status mattered: the propertied and merchant class. For the vast majority of women and men in the eighteenth century who had little or no property the status of marriage held less relevance (Parker, 1990). This was particularly the case for the poor as they tended to marry informally (de facto marriage) and needed no-one’s blessing to cohabit, nor anyone’s permission to divorce.

By the late eighteenth century poverty and social unrest were causing problems for government, and marriage law had to develop and broaden its boundaries to include the poor as in the minds of rulers marriage was seen as an antidote to poverty and disorder and the ‘open flouting’ of Hardwicke’s Act by the poor “threatened to undermine the whole basis of state regulation of marriage” (Parker, 1990, p. 49). As Parker (1990, p. 47) observes, the history of marriage law is “a gradual, if ambiguous retreat” from Hardwicke’s “uniform and inflexible definition of marriage”, and it began with the introduction of civil marriage, which broadened the boundaries of marriage law to include the poor.

**The development of a modern state**

Civil marriage was linked to the transformation of English society during the second half of the eighteenth century, which required new methods of control and regulation. The expansion of industrialisation prompted a certain secularisation of society. This was a time of social, economic and demographic upheaval as there were now more opportunities for employment in towns and factories, which lead to a greater mobility of people. This made it easier for men to disappear, leaving their families to be cared for by the parish “while the absconder could contract a bigamous marriage elsewhere and start on creating new family responsibilities” (Finlay, Bailey-Harris & Otlowski, 2003).

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26 Historically ‘status’ was the law’s main role because it was primarily concerned with the rights which one member of the family could claim over another or over the latter’s property (Bromley & Love, 1987, as cited in Altobelli, 2003, p. 33).
These relationships were said to lead to “population crises and a drain on public funds” (Parker, 1990, p. 55). What was needed was a tracking system to tie families to the legal obligations of marriage – particularly the moral and economic obligations. The modification of law, and the implementation of new methods of control and regulation, was integral to the development of a new way of managing the population – and law here becomes one component in the detailed governance of families.

With the introduction of three pieces of legislation in the nineteenth century, the Poor Law Amendment Act 1834, the Civil Marriage Act 1836, and the Births and Deaths Registration Act 1836, all relating to the detailed governance of families, the state was able to create a national registration system whereby general knowledge of the state of the population could be known in increasing detail. According to Lord Russell, the Home Secretary who introduced the Births and Deaths Registration Bill into the House of Commons:

The registration of births, deaths and marriages was important for the security of property – important to ascertain the state and condition of individuals under various circumstances – important to enable the Government to acquire a general knowledge of the state of the population of the country (Parker, 1990, p. 58).

The combination of the Poor Law Amendment Act 1834, the Civil Marriage Act 1836, and the Births and Deaths Registration Act 1836, created a “logical, if unholy, trinity” offering a system of regulation that a state “in the process of modernisation” required (Parker, 1990, pp. 55, 74). It set up a system for collecting data about the population that gave politicians and law makers insights into the choices people were making, such as, who they were marrying, their eligibility for poor relief, and the details of any children born from the marriage.

**Poor Law Amendment Act 1834**

During the eighteenth century poor relief, an administered system of relief established in the sixteenth century, came in for constant criticism. It was argued that the system promoted “over-population through reckless marriage and the alleged erosion of work discipline by providing something for nothing” (Parker, 1990, p. 54). As Parker (1990, p. 55) suggests, “Improvident marriages were said to lead to population crises and a drain on public funds”, and what was necessary was a more comprehensive civil
system of registration. In 1832 a Royal Commission was set up in England that resulted in the *Poor Law Amendment Act 1834*. The Act passed the task of poor relief from parish authorities to Boards of elected guardians under central supervision and control. These elected guardians were armed with the task of monitoring any relationships between claimants of poor relief, and encouraging marriage as an alternative to poor relief. More importantly, if a woman was already pregnant then the lever of the Poor Law could be used to enforce marriage. Workhouses were set up with a strict regime of hard work and restricted diet, and the Act made relief conditional upon work. Any relief given was to be in such a form as to make dependency on poor relief less eligible than that of the poorest labourer, and make marriage more appealing as a goal for economic survival (Parker, 1990, p. 74). With the development of this Act, and its aim of deterring dependency on poor relief, it became important for the state to be able to identify who was responsible for the financial support of an individual. The *Civil Marriage Act 1836* created such a process in identifying who was responsible for whom through civil marriage.

**Civil Marriage Act 1836**

The *Civil Marriage Act 1836* was intended to promote the restoration of marriage amongst the poor by allowing purely secular marriage ceremonies before a public registrar. It extended the legal boundary of marriage by introducing marriage by religious groups other than the Church of England setting up a “two-track system for marriage in England” (Stone, 1990, p. 133). From now on people could either be married by a minister in a church or chapel, or by a state official in an office. As Stone (1990, p. 133) observes, civil marriage was “swift and cheap, and was intended to lure the poor back into matrimony.”

The *Civil Marriage Act 1836* enabled a registration system to be implemented to gather data about the population. The emphasis of the Act was on the collation of data, the issue of licences, the return of registers to London and the extent of jurisdiction (Parker, 1990, p. 74). Under this Act notice of impending marriage was read to three weekly meetings of the Board of Guardians, who had replaced the parish authorities, and now controlled decisions about eligibility for poor relief under the new *Poor Law Amendment Act 1834*. The state was becoming increasingly involved in the regulation of personal familial relationships, and the *Civil Marriage Act 1836* supported this focus by broadening the scope for the regulation of marriage to include the secular contract.
Births and Deaths Registration Act 1836

The Births and Deaths Registration Act 1836 was the third piece of legislation in this ‘logical, if unholy trinity’, and was passed together with the Civil Marriage Act 1836. It created a centralised system for registering births and deaths, and taken together with the Poor Law Amendment Act 1834, and the Civil Marriage Act 1836, implemented a compulsory civil registration of births, deaths and marriage, giving the state far greater access to detailed, reasonably accurate and up to date information on the population. Data on population numbers, births, mortality, marriage, eligibility for poor relief, and identification of legally specified dependents was now collected, enabling structures to be put into place “which allowed the state to identify legal relations of dependency”, through marriage and birth records, and “enforce duties of support through the Poor Laws" (Parkinson & Behrens, 2004, p. 118).

While the state had implemented a tracking system to tie families to the legal obligations of marriage, it was unable to stop people from divorcing. As the demand for divorce grew in the nineteenth century, government soon required a regulating system that tied all families – rich and poor – to the legal obligations of marriage after divorce.

Regulating divorce

During the mid- to late-nineteenth century the domain of the family began to change, as the Victorian ideology of the two spheres of marital harmony – the wife in the private home and the husband at work in the public market place – were beginning to disintegrate (Stone, 1990, p. 375). Together with the shift away from the dominance of the church, and the social, economic and demographic upheavals of the time, the demand for divorce grew. There were growing complaints that the high cost of divorce had “created one matrimonial law for the rich and another for the poor” (Stone, 1990, p. 368). According to Stone (1990), the women’s reform movement in mid-Victorian England was demanding the protection of married women’s property and equal access to divorce. Their argument was that working class families were feeling the strain of the number of wives working outside of the home and earning a wage, and this created pressure on government to provide “security for married women’s property”, and “greater access to divorce when marriage broke down, as it now more frequently did” (Stone, 1990, p. 374). There were many examples of injustice done to married, separated and deserted wives, such as the deserted wife who supported herself for
many years by running a school, until her husband returned and seized all of her property, including the school (Stone, 1990, p. 377). The rich were already marrying under a ‘settlement agreement’ which allowed the wife to retain control over her property through a trustee, but legislators feared that to extend the facility of divorce, or the protection of married women's earnings to the poor would “undermine what elements of stability existed in working class families” (Stone, 1990, pp. 375, 374). Access to divorce by the poor, it was argued, would turn out to be “one of the greatest social curses that this country has ever been visited with”, as the poor were seen “as a threatening, immoral, dissolute mass of people to whom it would be extremely dangerous to extend the facility of easy divorce” (Stone, 1990, pp. 371, 374).

In 1850 a Royal Commission was set up in England under Lord Campbell, to investigate the whole question of divorce (Young et al., 2013, p. 9). The main strands of arguments against divorce were centred on questions concerning the economic responsibility for any dependents of divorcing families, the belief in the sanctity and indissolubility of marriage, and concerns regarding the question of social stability as it related to the role of the intact, married family (Young et al., 2013, p. 10). In 1856 the House of Lords Select Committee produced a draft, which recommended the “protection of property and earnings of separated wives from seizure by their husband” (Stone, 1990, p. 376, original emphasis). The draft gave these women the freedom to make contracts and be treated in law as if they were unmarried. It also recommended a broadening of the grounds by which a woman could sue her husband for divorce, but these “compromise proposals, which included some very large concessions to wives, were only grudgingly accepted by the government” (Stone, 1990, p. 376).

The subsequent enactment of the Divorce and Matrimonial Causes Act in 1857 took divorce and matrimonial causes out of the hands of the ecclesiastical court and allowed for divorce in limited circumstances based on the legal concept of ‘fault’ and that meant adultery. Adultery was considered to be a “heinous transgression against the marriage contract”, and as such it went to the very heart of the institution of marriage (Finlay et al., 1997, p. 9). This limitation on eligibility to divorce met the moral requirements of most of those parliamentarians who argued against divorce, and for the sanctity of marriage. It reassured them that divorce was only available in very limited circumstances. The legal concept of fault, as embodied in the Act, was based on a sexual

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27 It was not until 1882 that ‘married’ women’s, rather than ‘separated’ wives property was secured (Stone, 1990).
double standard. While the husband could divorce his wife for adultery, a wife could only divorce if she could prove her husband’s ‘aggravated adultery’, which meant “adultery coupled with incest, bigamy, cruelty or desertion for two years”, or “his conviction of sodomy and bestiality” (Finlay et al., 1997, pp. 8-9). As Young and others (2013, p. 12) point out, the Divorce and Matrimonial Causes Act of 1857 “perpetuated and institutionalised in a very real sense the inequality of the sexes.” They make the observation that this double standard led to many women being trapped in empty marriages or having to ‘live in sin’ due to the difficulty they had in proving aggravated adultery (Young et al., 2013, p. 12). Adultery remained the only ground for divorce until the early twentieth century (Young et al., 2013).

By the early twentieth century, the economic burden that broken marriages placed on governance required a new approach to divorce. As Young and others (2013, p. 13) describe it, “people were forming ‘illicit’ unions and ‘illegitimate’ children were born, but it was often difficult or impossible to enforce the obligation to support on a provider, which left the state to pick up the tab.” Apart from the removal of the ‘double standard’ in England in 1923, (which had discriminated against wives in the application of adultery), it was not until the introduction of the Matrimonial Causes Act of 1937 (UK) that the grounds for divorce were extended (Young et al., 2013). The new ground for divorce of ‘incurable insanity’ marked a shift in law, being the first step away from ‘fault’ and towards ‘irretrievable breakdown’. As Young and others (2013, pp. 14-15) point out, this was significant, because instead of “searching for an often elusive causation”, it looked at the ‘reality’ of the marriage relationship. This first step away from fault towards ‘irretrievable breakdown’ may have been a small step in English law, but it marked the beginning of a shift away from conceptualising divorce as a remedy for a legal wrong. As Stone (1990, pp. 401-402) observes, after the passage of the 1937 bill, “the pressure for divorce reform eased off, especially in light of the gigantic increase in the divorce rate briefly stimulated by the Second World War.”

In 1956 a Royal Commission on Marriage and Divorce in England identified some general trends that were driving up the divorce rate. The Royal Commission’s report identified factors that were putting pressure on marriages such as, a housing shortage, an increase in teenage marriage, new technologies, such as “greater knowledge and acceptance of birth control devices” and the “invention of penicillin”, the increase of women in work, and the demand by wives for “greater equality in power with their husbands”, amongst other things (Stone, 1990, p. 403). To deal with these new attitudes and social factors, some members of the commission proposed that divorce
“be available on demand if mutually desired by both spouses; and also available, even against the wishes of one spouse, after a delay of seven years” (Stone, 1990, p. 405). These proposals were opposed by the rest of the commission, but as Stone (1990, p. 405) observes, “for better or worse, it left behind the germ of an idea, as well as a precedent for treating divorce as a purely secular issue, to be discussed on purely secular and pragmatic grounds.”

In 1964 in England a group comprised of church members, lawyers and judges was appointed by the Archbishop of Canterbury to consider the law of divorce (Stone, 1990, p. 406). Their 1966 report titled Putting Asunder, sought to rationalise a modern divorce law for modern times. It recommended ‘irretrievable breakdown’ be the sole ground of divorce and that abuse be guarded against by a judicial inquest in each case (Stone, 1990, p. 406). The newly established Law Commission, to which Putting Asunder was referred, agreed with the report’s proposal that ‘breakdown’ be the sole ground for divorce and that it be indicated by a period of separation, but they added that if it was to be the sole ground for divorce then the separation period should be quite short (Finlay et al., 1997, p. 14). They concluded that the report’s proposal for an inquest in every case was impracticable. The resulting Divorce Reform Act 1969 in England represented a compromise between the views of the Law Commission and the Archbishop’s committee (Stone, 1990).

The United Kingdom recommendation, that ‘irretrievable breakdown’ be the sole ground for divorce, was an important part of the development of family law in Australia in the early 1970’s. It is to the history of these developments in Australia that I now turn.

**Evolution of family law in Australia**

Lord Hardwicke’s Marriage Act of 1753 was the prevailing marriage law in Australia at the time of the first European settlement and remained fundamentally unchanged until the introduction of the Civil Marriage Act 1836 in England. As previously highlighted, the Civil Marriage Act 1836 introduced civil marriage and marriage by religious groups other than the Church of England. This was an important consideration in Australia due to the number of marriages taking place in remote settlements where there was no minister available to conduct a marriage ceremony. The Governor of NSW, Governor Bourke, introduced a Bill on 28 July 1836 – modelled on the English Marriage Act. The Act, known as the NSW Marriage Act of 1836, did not apply in Tasmania, South
Australia and Western Australia. Marriage legislation was enacted in each of these colonies within the following eight years. In 1865 the British Parliament passed the *Colonial Marriage Act* which declared the validity, throughout the Empire, of marriage legislation of all British possessions provided that both partners were “according to the law of England, competent to contract” of the marriage (McDonald, 1975, p. 11).

Divorce was as much an issue in Australia at this time as it had been in England in the 1850's. The demand for divorce in Australia led to an Act being passed in South Australia in 1858 titled ‘An Act to amend the Law relating to Divorce and Matrimonial Causes in South Australia’, which was known as the *Matrimonial Causes Act 1858*. This Act contained the sexual double standard as it had in England, whereby a man could get a divorce merely by proof of his wife’s adultery, but a woman had to show that her husband’s adultery was ‘aggravated’ by incest, bigamy, rape, sodomy, bestiality, cruelty or desertion for two years without reasonable excuse (Young et al., 2013, p. 11). This provision had its counterparts in laws relating to marriage and divorce in other Australian colonies.28 It was not until 1881 in New South Wales with the introduction of the *Matrimonial Causes Amendment Act* that “a woman who was domiciled in New South Wales” was able to divorce “on proof of the husband’s adultery” without the ‘aggravated’ provision (Parkinson & Behrens, 2004, p. 120). The other Australian colonies eventually removed the double standard as well, although this development had to wait until the twentieth century.

With the federation of the Australian colonies, and the enactment of the Australian Constitution in 1901, the Commonwealth Parliament was given power under section 51 of the Constitution to legislate in the fields of ‘marriage and of divorce and matrimonial causes, and in relation thereto, parental rights, and the custody and guardianship of infants’. For the first sixty years of its existence the Commonwealth did not avail itself of these powers, and as a result these matters continued to be dealt with under State laws.

28 Matrimonial Causes Act (1860) (Tasmania); Divorce and Matrimonial Causes Act (1861) (Victoria); Ordinance to Regulate Divorce and Matrimonial Causes (1863) (Western Australia); Matrimonial Causes Jurisdiction Act (1864) (Queensland), and the Matrimonial Causes Act (1873) (NSW) (Parkinson & Behrens, 2004, pp. 119-120).
**Australia since 1945**

Marriage and family life have undergone major changes in Australia since the end of the Second World War. The ‘marriage boom’ of the 1940’s led to an increase in the demand for divorce. Many separated women remained dependent on welfare for as long as they were unable to remarry, and the institution of marriage appeared to be under threat as those unable to remarry often chose to live together. The dominant discourse of divorce came to revolve around the economic consequences of marriage breakdown, and in line with this, the focus of family law shifted from the legal status of marriage to the economic reality of family life. In 1959, the federal government exercised its powers over marriage and divorce to create a national divorce law in the *Matrimonial Causes Act 1959*. Almost all of the grounds in this Act involved the notion of a ‘matrimonial offence’.

**Matrimonial Causes Act 1959**

At this point there were fourteen grounds for dissolution of marriage and most of them were ‘fault’ based. However, there was one ground that was to prove of immense importance to the development of divorce law: ‘separation for five years’. This ‘non-fault’ ground enabled either party to obtain a divorce on the basis that the parties had separated and lived separately and apart for not less than five years. The *Matrimonial Causes Act 1959* was severely criticised at the time for introducing this non-fault ground. There were fears that the Act had introduced the concept of ‘divorce by consent’ and this would “open the floodgates of divorce, and so lower the moral standards prevailing in the community” (Finlay & Bissett-Johnson, 1972, p. 27). One senior politician of the day, Mr Arthur Calwell, summed up this attitude in the following terms:

> I refuse to help raise the palsied arm of this Government as it seeks to bestow a benediction on promiscuity. I refuse to join the Attorney-General in giving some sort of smelly, secular sanctification to barnyard morality (Finlay & Bissett-Johnson, 1972, p. 27).

To counter the opposition to the non-fault five-year separation ground, the government of the day encouraged the focus that the Act gave to marriage guidance and reconciliation. This included a duty imposed on judges and lawyers generally, at all stages of the divorce process, to consider and promote any possibilities of reconciliation, and a power and duty to adjourn proceedings where such a possibility
seemed to exist. The Commonwealth Government gave financial support to organisations such as the Marriage Guidance Councils to promote these objectives (Finlay et al., 1997). However, it soon became apparent to marriage guidance counsellors that, in the majority of cases, “it was too late to expect reconciliation” after being separated for five years, and it eventually “came to be accepted that they were more likely to be offering ‘separation counselling’ rather than ‘marriage counselling’” (Finlay et al., 1997, p. 87). Further, waiting five years to divorce was too long to wait for many married couples and the fault-based ground of adultery was often triggered through their collusion. As Young and others (2013) maintain, married couples keen to divorce would often agree to arrange a scenario demonstrating adultery in the hope of divorcing as quickly as possible. If their attempts to collude became known to the court the right to divorce was negated and charges of perjury could be made.

By the mid to late 1960s it was becoming clear that in some respects the Matrimonial Causes Act 1959 “no longer met the social requirements of the times” (Young et al., 2013, p. 19). As Dewar (1998b, p. 476) argues in relation to divorce legislation in England and Wales in the 1960s, “there was relatively little that the law could do to stop married couples divorcing”, and “the best that could be hoped for was that the marriage could be buried with a minimum of distress.” The political atmosphere and social attitudes of the late 1960s in Australia was geared to the idea of reform and the first legal move in this direction was the establishment of a Family Law Committee by the Sydney University Law Graduates Association in 1966. The recommendations from the Family Law Committee’s first report in 1967 foreshadowed future changes to family law in Australia. Recommendations included the creation of a specialist Family Court where legal and non-legal professional staff could be brought together to deal with family law issues, and a non-adversarial system of family law could be established. At the same time as these recommendations were being made the adversarial nature of contemporary divorce law was being questioned by those working in the area of family law.29

As previously highlighted, around this time similar concerns were being expressed in the United Kingdom with the newly established Law Commission. In Australia the approaching 1972 federal election was the impetus for the Family Law Committee to

29 Starr (1996) refers to Justice Barber of the Victorian Supreme Court stating that the adversarial process was “utterly unsuitable for the proper investigation and determination of domestic disputes” (as cited in Parkinson & Behrens, 2004, p. 129).
discuss divorce law reform with Labor leader in the Senate, Lionel Murphy, and find out whether the Labor party were receptive to divorce law reform. Senator Murphy eventually introduced a Bill into the Australian Parliament that would become the *Family Law Act 1975*.

**Family Law Act 1975**

The early 1970’s was a time of significant social change in Australia: ‘Second wave’ feminism was “generating various critiques of presumptions about women’s place in the family and the nature of mothering” (van Krieken, 2005, p. 31), and, together with a number of other social and demographic changes, such as women and work, separation of sex and marriage, increasing cohabitation, increases in the number of children born outside marriage, higher divorce rates, and a crisis in the welfare state, the consensus surrounding the values and beliefs about family life was weakening. With the arrival of a federal Labor Government in 1972, and their commitment to social reform, “the time was ripe for a further review of divorce laws” (Young et al., 2013, p. 19).

The *Family Law Act 1975* came into operation on 5 January 1976, and central to it was the abolition of matrimonial fault as a basis for divorce. As a result, all fourteen grounds of divorce were swept away and a single new ground took their place: ‘irretrievable breakdown of marriage’, as recommended by the Law Commission in the United Kingdom. The only way in which irretrievable breakdown could be proven was that the parties had separated and thereafter lived separately and apart for a continuous period of not less than twelve months. The *Family Law Act 1975* gave power to the Commonwealth Government to make laws with respect to marriage and divorce, and created the Family Court of Australia. This specialist court was established in all States and Territories except Western Australia, which was the only state to avail itself of the provisions within the Act (s41), which enabled State family courts to be set up. The Family Court of Western Australia was established in 1976 as a State court under the *Family Court Act 1975* and has jurisdiction in both State and Federal family law.30

30 While the existence of a state family court presents technical issues of jurisdictions, and occasional discrepancies in the law of the two jurisdictions, by and large to users of the system the Family Court presents a national uniform specialist court, tailored to the needs of family law cases (Young et al., 2013, p. 24).
The stated aim of the *Family Law Act 1975* was to reflect a non-judgemental perspective on the breakdown of marriage while shifting the focus of family law from the status of marriage to the status of parenthood. The abolition of the ‘fault’ concept diverted attention away from the reconciliation of disputing couples to issues relating to the impact of divorce on the family and especially children; children’s interests became the primary concern of the family law process. This attention to the special needs of children supported the focus of the new family law, whereby the significance of the status of marriage diminished and the status of parenthood, from a legal point of view, became more important (Parker, Parkinson & Behrens, 1994, p. 98). In short, the new family court was to be a ‘caring court’ that offered a wide range of dispute resolution and other services to its clientele. As Dewar (2000b, p. 52) points out, “It was to offer a more humane approach to the resolution of family disputes than the fault-based regime that preceded it.” In following this approach, the family court recognised that matrimonial disputes and their settlement required a range of services besides those customarily available to litigants in law cases. These services were to focus on the needs of children, and were closely linked to assisting parents avoid conflict and reach agreement on how their affairs should be ordered after divorce. What Day Sclater and Piper (1999b) call the ‘post-divorce’ family was to emerge more fully at this time. They cite evidence from debates and Government papers on family law in England to suggest that “divorce, once pathologised as chaos and disaster” was in the process of being reconstituted “as merely a transition in the family life cycle” (Day Sclater & Piper, 1999b, p. 11). This worked to offset the social anxieties generated by fears about family breakdown: “If divorce is simply an event in the family life cycle, then it no longer unequivocally signifies either the breakdown of families or the ‘decline of the family’” (Day Sclater & Piper, 1999b, p. 11).

To this end, counselling services were incorporated into the new family court in the mid-1970s and parents were encouraged through the *Family Law Act 1975* to utilise these informal forums rather than rely on a judicial determination. This emphasis on conciliation as a means of resolving disputes represented a substantial break with tradition and transformed the way in which divorce matters were managed. Initially referred to as ‘alternative’ dispute resolution, where dispute resolution was viewed as an alternative to litigation, parents were encouraged to put the welfare of their children first and avoid conflict. The move was set against the view that litigation in family matters could turn parents into “greater adversaries than they were to begin with” and the effect on the family “can be nothing short of devastating” (Finlay et al., 1997, p. 88).
Further substantive reform to family law came 20 years later with the implementation of the Family Law Reform Act 1995, which reinforced the focus on children's matters at divorce in the new Part VII. These reforms were influenced by various factors including Australia's ratification (in 1990) of the United Nations Convention on the Rights of the Child (1989), and the Family Law Council of Australia's (1992) Report on Patterns of Parenting after Separation.

Family Law Reform Act 1995

In its last months in office, the Keating Labor Government introduced the Family Law Reform Act 1995, which came into operation on 11 June 1996 and is now consolidated within the Family Law Act 1975. The origins to this Act can be found in the Family Law Council of Australia's (1992) Report titled Patterns of Parenting after Separation, together with Australia's ratification of the United Nations Convention on the Rights of the Child (1989) in December 1990. Writing on the Convention, Young and Monahan (2009) observe that it represents the most comprehensive statement of children's rights ever drawn up at the international level, and point to its significance in shaping the first major wave of family law reforms in Australia. In their report, the Family Law Council of Australia (1992) recognised the importance for children of maintaining contact with both parents after separation, and acknowledged the detrimental effects resulting from the long-term or permanent absence of a parent from their lives. With this in mind, they embraced the notion of 'cooperative parenting' and recommended the 'welfare principle' be renamed the 'best interests' principle for conformity with the language of the Convention on the Rights of the Child. This focus is underscored in the provision that before a decree absolute can be granted, a judge has to declare that he or she is satisfied that the provision made for the children of the family are adequate. In line with these recommendations, the Family Law Reform Act 1995 recognised the rights of the child, in the form of their right to know and be cared for by both parents, and their right to contact on a regular basis with both parents. As Dewar (1998b) points out, the concept of a child having a right was a new one in family law legislation.

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31 As Young and Monahan (2009, p. 250) point out, while the Convention does not, upon ratification, operate its own force in domestic law, by ratifying the Convention Australia has given a commitment to undertake all appropriate legislative, administrative and other measures for the implementation of the rights recognised in the Convention.

32 FLA s 55A(1)
The key aim of these reforms was to emphasise the ‘joint responsibilities’ of separated parents for their children’s care irrespective of where the child lives or who is the primary carer, replacing the former custody and access law with a ‘shared parenting’ regime. With this came a shift away from the idea that parents have proprietorial interests in their children towards a new way of thinking that their position is best seen as one of continued parental ‘responsibility’ (Bainham, 1998). A co-parenting approach requires both parents to put their children first and be involved jointly in their day-to-day care. To this end, the terminology of the Family Law Reform Act 1995 emphasises that the relationship between each parent and child is a continuing one, and survives after divorce. Parents are encouraged to reach agreement on the future parenting plans of their children, and agreements to do this are a necessary requirement for divorce.33 The inclusion of a principle stating that parents should agree about the future parenting of their children is evidenced in the fact that Part VII of the Family Law Reform Act is primarily focused on disputes about parenting.34 If parents are incapable of completing this task then, as Neale and Smart (1999, p. 38) suggest, “a growing number of self-help manuals and professional welfare services are available to guide them, including mediation services (…)”. If parents still cannot reach an agreement then the Family Court will make the decision for them – with little room for manoeuvre. To underline my previous point: law plays a significant role in transforming divorce from a termination into a restructuring of family ties through parenthood in the shape of the post-divorce family. As Neale and Smart (1999, p. 40) observe:

In uncoupling the legal status of parenthood from the legal status of marriage, parenthood begins to supersede marriage as the bedrock of the family and as the central mechanism for the legal regulation of family life.

In parallel, Dewar (2000b, p. 66) observes that within modern family law, marriage (no longer for life) becomes a partnership, while parenthood becomes “a matter of ‘nature’ that creates obligations ‘for life’.”

Writing about family law reform in the United Kingdom, Day Sclater and Piper (1999b) make the observation that reform of divorce law has come at a time of widespread concern about a ‘crisis in the family’. Historically there have always been concerns surrounding the ‘decline of the family’ and the threat divorce posed to social cohesion

33 FLA s 63B
34 FLA s 60B(2)(d)
and stability. Debates in the United Kingdom and Australia surrounding divorce reform were premised on the idea that ‘the family’ “is central to both personal fulfilment and social stability” (Day Sclater & Piper, 1999b, p. 7). Significantly, and as previously highlighted, the family is increasingly seen as the primary source of economic support for its members and as the means of their socialisation, and modern family law's particular function is to contain support obligations within the private sphere. Through the development of family law legislation relating to divorce, family separation and divorce is now presented as an opportunity to preserve ‘the family’ in the shape of the restructured ‘post-divorce’ family, with legal, economic and moral obligations on parents to distribute resources to their children across two households after divorce.

**Family Law Amendment (Shared Parental Responsibility) Act 2006**

With the growing trend towards non-adversarial dispute resolution procedures, the *Family Law Amendment (Shared Parental Responsibility) Act 2006* introduced a number of new parts into the *Family Law Act* relating to dispute resolution procedures. The aim of the Act was to reduce costs and complexity relating to family law disputes, to increase flexibility and ensure a child-focused approach in trials, as well as to overhaul the child support system. It also aimed to ensure that children benefit from the active involvement of both of their parents in their lives. The history to these reforms was the Report by the Family Law Pathways Advisory Group (2001), *Out of the Maze*, which made 28 recommendations, including recommendations to actively promote non-adversarial dispute resolution and other good practices, and the inquiry and Report by the House of Representatives Standing Committee on Family and Community Affairs (2003), *Every Picture Tells a Story*, which made 29 recommendations, including how to provide support for positive parenting and family relationships.

Besides the significant legislative reforms to encourage ‘shared parenting’ (s 65DAA), this Act replaced all references to the term ‘mediation’, and other well-known dispute resolution processes, with the generic term family dispute resolution (s 10F). The centrepiece of the 2006 Amendment Act was the allocation of a budget of $400 million

35 The Family Law Pathways Advisory Group (2001) is a joint initiative of the Attorney-General and the Minister for Family and Community Services. Its focus is on achieving better outcomes for family members, particularly children, following the end of a marriage or relationship. The Advisory Group has been asked to suggest ways to make the system work better for all the members of the families who need to use it.
to the establishment of sixty-five community based Family Relationship Centres throughout Australia, constituting “a network of highly visible and accessible centres” (Parkinson, 2011, p. 186). These ‘satellite systems’ (Young et al., 2013, p. 52) were an ‘early-intervention initiative’ (Parkinson, 2011) established to provide information and advice on family breakdown at arms length from the family court so that separating families could work out post-separation parenting arrangements without having to go to court. As Parkinson (2011) highlights, the concept behind the family relationship centres is that parenting disputes should not be seen as a legal issue from the beginning. When parents are having difficulty agreeing on their post-separation parenting arrangements they have a ‘relationship’ problem, not necessarily a legal one. In line with this, the community based family relationship centres were established to educate, support, and counsel parents through separation, and advise them on the range of post-separation services and support programs that are available outside of the family court. As Kaspiew and others (2009, p. E1) illustrate in their Report for the Australian Institute of Family Studies, Evaluation of the 2006 Family Law Reforms, these reforms were promoted as being aimed at bringing about “generational change in family law” and a ‘cultural shift’ in the management of parental separation, “away from litigation and towards co-operative parenting.”³⁶

Family relationship centres are a form of governing ‘at a distance’ through the instrumentalisation of regulated autonomy. Funded by the Commonwealth Government and run by non-governmental organisations with experience in child and family matters, including dispute resolution, they act as a gateway to the many other government and non-government services available to separating couples. Their focus is “to be squarely on keeping parents out of court” (Young et al., 2013, p. 53, my emphasis). Though family relationship centres provide a gateway to other services, such as support programs for separated fathers or information on how to apply for child support, their primary service is family dispute resolution. The 2006 amendments made attending family dispute resolution a legal requirement before a person can file an application for parenting orders in court, unless there are reasonable grounds to

³⁶ The Australian Institute of Family Studies (AIFS, 2014) is the Australian Government’s key research body in the area of family wellbeing. Its role is to increase understanding of factors affecting how Australian families function by:

– conducting research; and
– disseminating findings.

The Institute’s work provides an evidence base for developing policy and practice related to the wellbeing of families in Australia.
believe that there was a risk of child abuse or family violence.\textsuperscript{37} The reforms also broadened the role of family court mediators to that of the court-based family consultant who, in their role as behavioural science ‘experts’ in child and family issues, work within the family court system and make recommendations on the appropriate course of action to be taken in each instance. Their involvement with the family is on a non-confidential basis, and if the case cannot be resolved without adjudication then the family consultant prepares a report and gives evidence to the family court setting out relevant issues relating to the care, welfare and development of the child to assist the court in determining the best outcome for children. These consultants are given a wide remit and gather information for their reports not only from their own interviews and observations but also from child protection services, the police, psychiatrists and psychologists, schools, child experts, and other experts as required. In line with the trends illustrated so far, their role is to ensure that, where possible, “matters that come before the court are resolved without a judicial determination”, and in all cases to ensure “that the interests of children are protected” (Young et al., 2013, p. 80). In performing this function the family consultant maintains the same protection and immunity as a judge of the Family Court.

As a postscript to these amendments, the tension between the dual objectives of the Family Law Amendment (Shared Parental Responsibility) Act 2006 of ‘shared parenting’ and ‘protection from family violence’ “fuelled continuing debate about whether family law reform was strengthening or weakening protection for victims of violence” (Young et al., 2013, p. 42). The emphasis on ‘shared parenting’, in the 2006 legislation, had often been to the detriment of the protection of women and children from violence as “there was nothing in the Act which prioritised one primary consideration over the other; in other words, protection from violence was not required to be accorded more weight than promoting shared parenting” (Young et al., 2013, p. 43). The 2009 evaluation by the Australian Institute of Family Studies indicated that there had been an acceleration of the pre-existing trend toward shared care and that these arrangements were generally quite positive, however, on a more critical note, it also found that shared care exposed children to a greater risk of violence (Kaspiew et al., 2009). As a result of these concerns, the Family Law Legislation Amendment (Family Violence and Other Measures) Act 2011 emphasises that when considering the two

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primary best interests considerations, greater weight must be given to protection from violence (Young et al., 2013, p. 44).

Recent and contemporary insights

Marc Galanter (1992) made the observation that in the course of a generation, from 1960 to the late 1980s in the United States, governmental concern began to extend into varied areas of daily existence, and law needed to transform to respond to these new circumstances. As a result, the legal world expanded and broadened its scope to incorporate ‘more non-legal materials’ and, at the same time, adopted “new modes of analysis not so distinct from other discourses”, issuing from ‘multiple sources’ (rather than just the court room), with an emphasis on negotiated legal outcomes, rather than a formal judgement (Galanter, 1992, pp. 18, 24, my emphasis). From here he suggests that dispute resolution processes, previously only used in minor matters, began to move from “the periphery to the centre of legal work” as more interest groups and ‘strategic players’ became involved in the legal arena (Galanter, 1992, pp. 11, 13). Within this ‘new legalism’, Galanter (1992, p. 24) maintains that law operates increasingly through ‘indirect symbolic controls’ – by ‘radiating messages’ rather than imposing physical coercion. Legal authority is no longer exercised from a traditional top down perspective; rather, as law expands and penetrates the world it becomes ‘less distinctive’ and ‘more diffuse’, “its institutions flourish but lose their autonomous, self-contained quality” (Galanter, 1992, p. 18).

Writing on the ‘normal chaos’ of family law, John Dewar (1998b, p. 470) suggests that modern family law is ‘an exemplary case’ of this ‘new legalism’, that is to say “it is an area of law that operates not by direct physical coercion or ‘brightline’ rules”, but by ‘radiating messages’. Writing on the impact of the 1995 family law reforms in Australia, specifically, Part VII which deals with children, Dewar and Parker (1999, p. 107) suggest these reforms will have their greatest effect in “changing attitudes rather than rules – or creating perceptions of change – and altering the mind-set of family law professionals and participants.” Similarly, Chisholm (1996, p. 185) suggests that the 1995 reforms were “clearly intended to change people’s perceptions and attitudes”, and makes the observation that Parliament obviously hoped to “increase the number of

\[38\] Galanter (1992) suggests that the same developments could also be observed in Canada and the United Kingdom.
cases resolved by agreement’” and more generally “to improve the level of co-parenting following the end of a marriage or relationship” by placing an emphasis on parental ‘responsibility’ rather than ‘rights’. As part of this, Dewar (1998b, p. 474) maintains that the task of modern family law is to “set the tone for private ordering”, that is to radiate messages that will encourage responsible parents to settle their differences without going to court.

Writing in the defence of the role of law in family matters, Dewar (2000a, pp. 79-80) argues that law – understood as a set of practices and institutions – “calls us back to the level of practicality, or functionality”, that is, to “what will work.” As he maintains, in areas of ‘radical disagreement’, such as the terms on which families should separate, “law (at least as a mode of reasoning and as a way of framing practical solutions to disagreement) is perhaps our only hope of finding common ground” (Dewar, 2000a, p. 60). For law’s ‘uniqueness’, according to Dewar (2000a, p. 80), lies in its ability to “provide a context”, and in family matters, where disagreements that involve the human passions can be difficult to contain, legal discourse ‘lowers the level of abstraction’, and shifts the focus to the practical or the functional. In line with this, Gwynn Davis (2000, p. 139) makes the same point when he argues that “law cannot deal with human emotions in all their complexity, but law connotes authority, and it can provide containment.” My crucial point here, following Dewar, is that as modern family law expands and penetrates family life it becomes more contingent and responsive to reflect changes in our social relations; yet, at the same time, the legislative and judicial power and authority of law provides institutional settings and legal sanctions that set limits on our choices and possibilities in order to sustain a legal system. The way in which the institutions of law set limits on our choices and possibilities is the focus of my next chapter.
This chapter explores my proposition that the regulations of family law together with their institutional setting (laws, courts, government agencies) simultaneously constrain and enable the responses of separating couples; that is, institutions set limits on how couples can behave while also channelling their responses in particular directions and, in the process, potentially silence and subordinate other views, voices, values and emotions to ensure a rational/civilised outcome at divorce. My discussion is anchored in the work of Michel Foucault, as his insights into law and governmentality provide very precise insights into the ways in which subjects are actively involved in their own self-government. In his essay on governmentality, Foucault (1991, p. 95) describes the shift from the power of the sovereign imposing law from above, toward a mentality of government that was about ‘disposing of things’ – that is employing ‘tactics’ rather than imposing laws, though “using laws themselves as tactics” to enable certain ends to be achieved. This perspective has a three-fold significance for my purposes: it opens a way of looking at how populations can be governed through their capacity to govern themselves; it illuminates the significance of the family as an instrument of governance; and, highlights the important role that law plays in this process.39

Foucault suggests that to understand the relationship between law and governance we need to understand the close connections between power and knowledge; most significantly, he argues that government within a liberal regime requires a degree of freedom on the part of its subjects and this freedom is made possible by securing the conditions under which the governed are able to govern themselves. He and others (Miller & Rose, 1990; Rose, 1996; Rose & Miller, 1992) point to the important role that knowledge claims play in establishing vital links between political objectives and

39 I will deal with Foucault’s ‘expulsion’ thesis in the second part of this chapter.
personal conduct. Writing on *Foucault’s Law*, authors Golder and Fitzpatrick (2009, p. 61) describe the contribution law makes to this process as a relation of ‘reciprocal constitution’ between law and disciplinary power. I will discuss their insights further in the second part of this chapter, for now I suggest that their ‘retrieval’ of Foucault’s approach to law illuminates the complexities of the relationship between law and disciplinary power, and provides important insights into the role that law (its institutions, functionaries, calculations and regulations) plays in managing both the broad administration of family affairs and the potential disagreements between partners at the time of divorce. I illustrate this by combining a discussion of the theoretical literature with the historical and contemporary developments in family law, as well as specific references to the family dispute resolution process.

**Foucault, governmentality and the family**

Foucault’s term ‘governmentality’ describes a particular mentality of government that has come to characterise western forms of governance from around the mid-eighteenth century on. This eighteenth century transition from an ‘art of government’ – which was tied to the structures of sovereignty, to a ‘mentality’ of government – which is about the techniques of government, depends on the notion that society can be administered effectively, and that reality is programmable. With his ideas on ‘governmentality’, Foucault offers a particular ethos of analysis: a way of thinking about the links between the domain of politics, the exercise of authority, and norms of conduct in our societies. He provides tools for understanding some of the contingencies of the systems of power that subjects inhabit. Under this approach, concepts such as strategies, technologies, programmes and techniques veer away from the generalities of grand theory towards a more modest role for theorising. At the same time, Foucault (1982, p. 221) argues that the notion of ‘government’ should be interpreted widely:

> Government must be allowed the very broad meaning which it had in the sixteenth century. ‘Government’ did not refer only to political structures of the management of states; rather it designated the way in which the conduct of individuals or states might be directed: the government of children, of souls, of communities, of families, of the sick. It did not cover only the legitimately constituted forms of political and economic subjection, but also modes of action, more or less considered and calculated which were designed to act upon the possibilities of action of other people. To govern, in this sense, is to structure the possible field of action of others.
For Foucault (1991, p. 94), “to govern is to govern things”, and it is in this idea of governing ‘things’ that government can be clearly distinguished from sovereignty. Sovereignty for Foucault was about obedience to the law, and law was the instrument that allowed sovereignty to achieve this aim. As he describes it, prior to the sixteenth century the sovereign exercised power upon the subjects of their territory. Throughout the Middle Ages many treatises were presented as ‘advice to the prince’, concerning the “proper conduct, the exercise of power, the means of securing the acceptance and respect of his subjects (...) etc.” (Foucault, 1991, p. 87). From the middle of the sixteenth century to the end of the eighteenth, there developed “a notable series of political treatises”, no longer considered ‘advice to the prince’, rather, they were considered as “works on the ‘art of government’” (Foucault, 1991, p. 87). Foucault (1991, p. 90) suggests that around this time there is a problematic of government in general and that this related to the ‘fragile link’ that bound the prince to his principality, placing him external to it. The prince was bound to his principality by virtue of family heritage or treaty, subsequently there was “no fundamental, essential, natural and juridical connection between the prince and his principality” (Foucault, 1991, p. 90). Further, and as a corollary to this:

(...) given that this link is external, it will be fragile and continually under threat – from outside by the prince’s enemies who seek to conquer or recapture his principality, and from within by subjects who have no a priori reason to accept his rule (Foucault, 1991, p. 90, original emphasis).

This fragile link is what the art of government has as its object. Under it, power is exercised so as to strengthen and protect the principality and this involves establishing an upwards and downwards continuity between subjects and its sovereign powers.

This involved important changes to the role of the family in the administration of state affairs. Historically the family took precedence over the state by virtue of its prior existence. The family was a private sphere where the father exercised dominion over his wife, his children and his slaves. It was also the site of production and reproduction. The family operated an economy (oeconomy) of itself, and was both the subject and object of government. By the mid-eighteenth century, government’s reliance on an economy based on the model of the family was found to be inadequate. This model was tied to structures of sovereignty, which made it difficult to administer the problems which government now faced. It was at this time that population came to appear above all else as the ultimate end of government. The family became of secondary importance, as an element internal to population: “no longer, that is to say, a model, but a segment”,

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but Foucault (1991, pp. 99-100) insists it remains “a privileged segment, because whenever information is required concerning the population (...) it has to be obtained through the family” (my emphasis).

Illustrations from family law

The 'privileged' status of the family is illustrated in the changing dimensions of law relating to the family, where, as we have seen, the administration of family affairs was and remains critical to the moral and economic concerns of the state. As previously established, the Civil Marriage Act of 1836 was initiated against concerns that the poor were choosing to live in de facto marriages rather than marry in the church, thus threatening the basis of the state regulation of marriage as enacted under Lord Hardwicke's Marriage Act of 1753. Hardwicke's Act had been designed to protect wealthy families from clandestine marriages by defining the 'status' of marriage within a list of legal requirements and formalities of the Church of England. This mid-eighteenth century law (the same historical period Foucault was describing) articulated strict parameters on marriage to protect wealthy families from unsuitable marriages and potential problems relating to legitimacy, property and inheritance. Because property and inheritance mattered little, if at all, to the poor, the status of marriage was irrelevant and they often chose not to marry. By the nineteenth century it was evident that if the state was to maintain control over the administration and regulation of marriage it had to broaden its scope to include the poor. The Civil Marriage Act 1836 introduced secular marriage ceremonies; they were 'swift and cheap' (Stone, 1990, p. 133) and intended to entice the poor to marry. In adjusting the boundary of marriage law to capture all segments of population, the wealthy and the poor, the state was able to maintain control of one (important) component of the detailed governance of the family – marriage.

By the twentieth century law's role expanded further into the administration of family affairs as the demand for divorce grew, illustrating how the administration of family affairs remained critical to the moral and economic concerns of the state. As discussed in Chapter Two, the Family Law Act 1975 was initiated against concerns that the Matrimonial Causes Act 1959 – which had been enacted against the post-war demand for divorce – was not meeting the social requirements of the time. The strict requirements for divorce within this Act had led to collusion and perjury between married couples wanting to divorce, and this was considered to be undermining the
meaning and sanctity of marriage. The burden of the costs of divorce to the state (court costs and welfare costs) and the impact of bitter, drawn out court cases on children were considerations in modifying divorce law (Dewar, 1998a). The developments in family law at this time focused on creating a way of dealing with divorce that would enable couples to divorce and remarry with a minimum of fuss. This required a shift away from fault-based divorce towards the non-adversarial, non-fault concept of ‘irretrievable breakdown’. The shift to irretrievable breakdown was intended to remove the win/lose outcome in divorce and avoid drawn out court cases associated with fault, minimising court costs for the state and creating a more harmonious transition for children. As Dewar (1998a) has highlighted, another reason the ability to remarry was in the state’s interest, was that when one of the new partners was working the state was relieved of the financial responsibility (welfare costs) for the new family.

**On population, political economy and the management of populations**

Foucault (1991, p. 100) argues that with the shift in the problematic of government in the mid-eighteenth century, the welfare of the population became the ultimate end of administration: “the improvement of its condition, the increase of its wealth, longevity, health, etc.” He argues further that the means that government uses to attain its ends are themselves all in some sense immanent to the population:

(…) it is the population itself on which government will act either directly through large-scale campaigns, or indirectly through techniques that will make possible, without the full awareness of the people, the (…) directing of the flow of population into certain regions or activities, etc. (Foucault, 1991, p. 100).

If they are to be governed, populations need to be calculated, measured and managed. This, as Lewi and Wickham (1996) point out, is reliant on the emergence of political economy. Political economy is concerned with the relationship between the individual, family, and government, and uses the concept of population as the primary means of recasting the art of government. This eighteenth century transition from an art of government to a ‘mentality’ of government, “from a regime dominated by structures of sovereignty to one ruled by techniques of government, turns on the theme of population and hence also on the birth of political economy” (Foucault, 1991, p. 101).
This calculative form of governance is illustrated in the early nineteenth century development of a registration system providing authorities with detailed information of their subject populations. As previously established, the coming together of the *Poor Law Amendment Act 1834*, *Civil Marriage Act 1836*, and the *Births and Deaths Registration Act 1836*, created a system for gathering key information on who was responsible for the financial support of an individual through marriage, and who was eligible for poor relief. Currently, in the early twenty-first century, the Australian Bureau of Statistics (2014, 2015) has a wealth of information relating to the family, such as statistics on family composition; family and domestic violence; marriage, partnering and divorce; household finances and financial stress; work and family balance; national health; health of children; population and housing; divorce rate and trends; children affected by divorce; religion, migration, education, superannuation and taxation.

A number of governmentality theorists have made the point that the development of the broad sphere of political economy was underpinned by the growth of the human sciences (Lewi & Wickham, 1996; Rose, 1996; Rose & Miller, 1992). Here there develops what Rose and Miller (1992, p. 183) refer to as ‘relations of reciprocity’ between the social sciences and government, whereby "government depends upon these social sciences for its language and calculations, so the social sciences thrive on the problems of government." These programmes of government presuppose that the programmable is 'real': “They make objects of government thinkable in such a way that their ills appear susceptible to diagnosis, prescription and cure by calculating and normalising intervention” (Rose & Miller, 1992, p. 183). In Rose and Miller’s (1992, p. 181) words, government is a 'problematising activity': "The ideals of government are intrinsically linked to the problems around which it circulates, the failings it seeks to rectify, the ills it seeks to cure.” In this way, programmes of government lay claim to knowledge of the sphere or problem to be addressed:

Governing a sphere requires that it can be represented, depicted in a way which both grasps its truth and re-presents it in a form in which it can enter the sphere of conscious political calculation. The theories of the social sciences, of economics, of sociology and of psychology, thus provide a kind of intellectual machinery for government, in the form of procedures for rendering the world thinkable, taming its intractable reality by subjecting it to the disciplined analyses of thought (Rose & Miller, 1992, p. 182, original emphasis).
In the context of the family, this produced an extensive field of information relating to varied areas of married life, devoted in many cases to its normative structure and internal welfare, particularly at the point of 'breakdown' or separation. Thus criticism of the 'non-fault' ground of 'separation for five years' within the Matrimonial Causes Act 1959 was countered by the inclusion within the Act of 'marriage guidance' to promote the possibility for reconciliation, or, failing this to resolve their disputes as swiftly as possible. The adversarial nature of divorce was posed as a problem for government on the basis that the “continuing bonds” of parenting required a harmonious relationship between divorcing parents, rather than a winner and a loser (Young & Monahan, 2009, p. 49). The origins of this supposition, and the means of alleviating the problem, can be traced to social science research into the ‘welfare of the child’ of divorced parents. The dominant message of the research is “taken to be that divorce is damaging to children” (Day Sclater and Piper, 1999b, p. 15), and this ‘damage’ could be ‘mitigated’ if parents were able to access therapeutic, counselling processes and reach agreement on the day-to-day care of their children (Neale & Smart, 1999, p. 38).

As will be further discussed in the next chapter, this broad body of research produced an extensive body of expert knowledge relating to the welfare of the child and influenced the development of legal policy relating to divorce. As previously outlined, developments in Australia include the Family Law Council of Australia’s (1992) Report, Patterns of Parenting after Separation, whereby a committee, consisting of representatives from marriage guidance, family law, and social research, evaluated relevant research studies relating to patterns of parenting within pre- and post-separation families; the effects of current family law practices on children and parents; overseas family law practices; and the evaluation and development of cooperative parenting models. The report recommended significant changes to the process of divorce, most significantly, changes in terminology within the Family Law Act 1975, with emphasis on cooperative parenting, parenting plans, and dispute resolution services. These recommendations have been taken up in subsequent family law reforms at Part VII of the Act, which deals with children and is primarily focused on disputes about parenting. As Day Sclater and Piper (1999b, p. 15) highlight, “invoking social scientific research, (...) lends a degree of certainty, of scientific validity, authority and convincingness to arguments which would otherwise appear to be merely

40 As previously established, these reforms were also influenced by Australia’s ratification (in 1990) of the United Nations Convention on the Rights of the Child (1989).
rhetorical or ideological in tone”. Though Day Sclater and Piper make problematic the validity of the research into what is considered to be in the best interests of the child, they note that the welfare discourse in which it acquires meaning is “increasingly entering into our culture’s stock of common sense”, and in the process potentially silencing other perspectives and voices at divorce – particularly the child’s (Day Sclater & Piper, 1999b, p. 14).

On the special place of psychology

As these examples illustrate, the psychological sciences, vital to the governance of interpersonal relations, are a prime example of the ‘intellectual machinery’ that represents the institutionalisation of the knowledge base of modern government, particularly as far as interpersonal relations are concerned. Psychology involves a specific type of attention to human individuality; it provides the mechanisms whereby human capacities and mental processes can be converted into information, and thus the internal affairs of the family are made subject to regulation. Defining psychology as “the science of the normal mental functioning of human beings” (Rose, 1985, p. 1), Rose (1988, p. 197) underlines how this information is presented in a calculable form for the purposes of orderly governance:

As objects of a certain regime of knowledge, human individuals become possible subjects for a certain system of power, amenable to being calculated about, having things done to them, and doing things to themselves in the name of psychological capacities and subjectivity.

Rose suggests that something significant occurred around the field of psychology in the late nineteenth century and early twentieth century. The ‘event’ relates to the translation or extension of certain recurrent questions about the nature of humans from the closed space of philosophy to a domain of positive knowledge: namely, the formation of psychology as a coherent and individuated scientific discourse (Rose, 1985). In this move, psychological normality was conceptualised as “merely a lack of socially disturbing symptoms, an absence of social inefficiency: That which did not need to be regulated” (Rose, 1985, p. 6, original emphasis). The free subject was one who was able to conduct their conduct according to the norms of civility. By extrapolation, the ‘free’ or ‘normal’ family was the intact family, able to support itself financially, and in which the health, welfare and education of children progressed according to certain established norms.
Governing at a distance

Governmentality theorists use the term ‘governing at a distance’ to describe the ‘liberal’ turn in western governance, wherein subjects become involved in their own self-governance. Foucault maintains that this requires a degree of freedom on the part of its subjects, with liberalism, as a distinctive rationality of government, pursuing the long-term objectives of government through the decisions of these free individuals. Under this line of interpretation, liberalism is seen as a set of practices that contrives to establish the conditions under which self-governance can be best achieved. Freedom, in this liberal sense, is “a kind of well-regulated and ‘responsibilised’ liberty” (Barry, Osborne & Rose, 1996, p. 8). In essence, while liberalism aims to free people from control by the state, it also attempts to ensure that people’s behaviour will be conducted according to appropriate standards of civility, reason and orderliness. This, I will suggest, is one of the key factors that allows the family dispute resolution process and family law more generally, to operate in a (generally) orderly fashion despite the economic and emotional issues at stake for parents.41

Rose and Miller (1992) point out that liberal government faces the problem that in aiming to govern the ostensibly private domain of the family it faces a domain that has its own naturalness, its own rules and processes, and its own internal forms of self-regulation. The task for effective governance is to manage this domain without destroying its existence and autonomy, and one of the key characteristics of this management is the strategy of ‘governing at a distance’ mentioned above. This requires the forging of alliances between expert knowledge and disciplinary institutions. It is also associated with a shift away from direct state intervention to a multitude of sites that consist of agents other than those of the state itself. Thus the discreet regulation of family affairs has, over time, come to encompass a range of agencies including schools, courts, medical clinics, and child health clinics, counselling agencies, social workers, financial advisors, taxation advisors and insurance companies, amongst others. Alongside this, expertise – through its authority arising out of a claim to knowledge – provides a solution to the need to “govern in the interests of morality and order”, while restricting government “in the interests of liberty and economy” (Rose, 1996, p. 39).

41 This is nevertheless a contested area. Vocal lobby groups such as fathers’ groups demand their rights, while the threats against Family Court judges and staff, made by aggrieved subjects can potentially threaten civility, reason and orderliness.
Here Miller and Rose (1990, p. 1) point out that the “self-regulating capacities of subjects, shaped and normalised through expertise, are key resources for governing in a liberal-democratic way.” To cite them at some length:

The vital links between socio-political objectives and the minutiae of daily existence in home and factory were to be established by expertise. Experts would enter into a kind of double alliance. On the one hand, they would ally themselves with political authorities, focusing upon their problems and problematising new issues (...). On the other hand, they would seek to form alliances with individuals themselves, translating their daily worries and decisions over investments, child-rearing, factory organisation or diet into language claiming the power of truth, and offering to teach them the techniques by which they might manage better (...) (Rose & Miller, 1992, p. 188).

In short, subjects need to be educated in ways to govern themselves. This education is dependent upon “the intellectual technologies, practical activities and social authority associated with expertise” (Miller & Rose, 1990, p. 1). As indicated above, this training in self-governance relies on expertise developed in sites other than family law itself, including health, welfare, education, sociology and psychology. I return to this in the next chapter, where I discuss the importance of a number of twentieth, and early twenty-first century developments bearing specifically on notions of parenting, childrearing, and the best interests of the child. I will argue that the educative information about ‘good parenting’ and ‘responsible citizenship’ embodied in these discourses are not ‘forced on’ parents, but form part of the social frame through which parents recognise and present themselves. In this way, they actively co-operate in their own governance, for as ‘responsible’ parents/citizens their capacity to contravene public norms without themselves losing status is limited.

Seen this way, the free subject/family is one who is able to conduct their conduct according to the norms of civility. In elaborating on this, Valverde (1996) contends that one of Foucault’s greatest insights was that liberal governance presupposed a parallel system of self-rule; a form of self-coercion or ‘despotism’. She makes the point that this does not indicate “a failure to complete the liberal project”, but rather a “seldom noticed but irreducible despotism in the heart of the paradigmatic liberal subject’s relation to himself [sic]” (Valverde, 1996, p. 359). In parallel, she suggests that liberal governance “has become increasingly a matter of ensuring the proper forms and procedures for decision making” (Valverde, 1996, p. 365). Tying these points together, it can be said that family dispute resolution relies not only on certain ‘proper forms and procedures’, thus following a certain standard process, as laid out in official documents,
but also trusting that couples will submit themselves to a form of ‘self-rule’, putting aside their disagreements, and following the conventions of the family dispute resolution process. I return to divorcing parents’ capacity for self-restraint and self-control in Chapter Five.

That couples do so behave is evidenced by the high rate of agreements reached.\(^42\) In this way, the official powers operating within family law can be seen to successfully shape and normalise the self-regulating capacities of subjects so that their personal choices will be aligned with the ends of government and durable arrangements relating to the care, welfare and development of the child are upheld by both parents. Importantly, these provisions are supported in the details of the legislation. Thus the legislative framework for matters concerning children is contained in Part VII of the *Family Law Act 1975*, with section 60B(1) stating that the best interests of children are met by:

- Ensuring that children have the benefit of both of their parents having a meaningful involvement in their lives, to the maximum extent consistent with the best interests of the child; and

- Protecting children from physical or psychological harm from being subjected to, or exposed to, abuse, neglect or family violence; and

- Ensuring that children receive adequate and proper parenting to help them achieve their full potential; and

- Ensuring that parents fulfil their duties, and meet their responsibilities, concerning the care, welfare and development of their children.

The principles underlying these objectives are outlined in s 60B (2):

- Children have the right to know and be cared for by both their parents, regardless of whether their parents are married, separated, have never married or have never lived together; and

- Children have a right to spend time on a regular basis with, and communicate on a regular basis with, both their parents and other people significant to their care, welfare and development (such as grandparents and other relatives); and

- Parents jointly share duties and responsibilities concerning the care, welfare and development of their children; and

\(^42\) As previously highlighted, the message from the Family Court of Western Australia’s website is that 95% of people who commence proceedings in the Family Court reach agreement and settle matters outside the formal operations of the court.
Parents should agree about the future parenting of their children; and

Children have a right to enjoy their culture (including the right to enjoy that culture with other people who share that culture).

These principles and the corresponding emphasis on 'responsibility' and ‘agreement’ have been described by Dewar (1998b, 2000a), following Galanter (1992), as 'radiating the message' of how to divorce well, and this message addresses itself to the wider audience of family law, rather than just lawyers and judges. This 'new style of family law', according to Dewar (2000a, p. 66) is consistent with the policy of facilitating agreement as it operates as "background noise, or tone-setting" leaving a measure of freedom.

More broadly, Foucault’s insights suggest that the apparent informality of the family dispute resolution process masks the extent to which power is in fact exercised. This concealment of its own operations, Foucault (1998, p. 86) suggests, is essential to the success of power: “power is tolerable only on condition that it mask a substantial part of itself” for subjects need to see it as a “mere limit placed on their desire leaving (them) a measure of freedom – however slight – intact.” The mechanisms of law remain hidden - as a 'pure limit set on freedom' – supporting and authorising the ‘norm’, while, at the same time, securing the conditions under which the governed are able to govern themselves. This complex relation of mutual constitution between law and disciplinary power highlights that law provides more than legal sanctions and institutional settings; it also provides the capacity to respond to and generate new possibilities. This proposition depends on certain key theoretical developments concerning the implications of Foucault’s approach to law, to which I now turn.

**Foucault and the expulsion thesis**

One of the more contested aspects of Foucault's approach to law is the 'expulsion thesis' – that is the suggestion that Foucault marginalised law from his critical accounts of modernity – as, for example, discussed by Hunt and Wickham (1994) in their book *Foucault and Law: Towards a Sociology of Law as Governance*. At the core of this proposition is the argument that Foucault identified law and sovereignty with a pre-modern form of negative, repressive power which is progressively overtaken by a new mode of operation, or technology of power, namely disciplinary power. Under this line of interpretation, law remains only to perform a residual role as instrument or accessory to disciplinary power and is denied any constitutive role within modernity.
This would imply a relatively minor role for law in the regulation of the family, wherein it serves only to restrict and enforce, so it is instructive that Hunt and Wickham (1994) also suggest that the 'late Foucault', as represented in *The History of Sexuality, Volume One: An Introduction* (Foucault, 1998), modified his argument for the expulsion of law from modernity, to a new focus on 'law and regulation'. Here they draw attention to his statement that he did not mean to say that "law fades into the background" or that "institutions of justice tend to disappear" but rather that "law operates more and more as a norm, and the judicial institution is increasingly incorporated into a continuum of apparatuses (medical, administrative, and so on) whose functions are for the most part regulatory" (Foucault, 1998, p. 144).

This point is important for my thesis as it indicates how family law operates through a series of tactics aimed at 'normalisation', illuminating how it articulates public norms relating to intra-familial relations, while also supporting the connections between other social, economic and cultural institutions. Seen this way, the *Poor Law Amendment Act 1834, Civil Marriage Act 1836*, and the *Births and Deaths Registration Act 1836*, and the *Family Law Act 1975* did not only enforce codes relating to the continuing obligations and responsibilities of marriage, they also helped to produce them. Hunt and Wickham (1994, p. 67) also point to the specificity and particularity of legal regulation in modern society (and its potential, in my analysis, to penetrate deep into the fabric of family life):

> Legal regulation becomes more and more deeply involved as one component of the detailed governance of many forms of social relations and institutions. It acquires an increasingly particular character of laying down detailed rules and procedures for a host of specialised areas of activity (...).

Despite these insights, Hunt and Wickham (1994) generally follow a modified version of the ‘expulsion thesis’. The fullest challenge to this line of interpretation comes from Golder and Fitzpatrick (2009), who, in their book *Foucault's Law*, build upon different readings of Foucault’s position on law in order to develop their own interpretation and retrieve law from being marginalised or expelled. They argue that what previous counter-readings have failed to do is “to capture the specificity of law, or to render an account of law’s different constituent dimensions” (Golder & Fitzpatrick, 2009, p. 100). While they agree that Foucault modifies the sovereign nature of power, they suggest this reduction is not, and never can be, total. In their understanding, Foucault’s concept of law cannot be subordinated to, or progressively overtaken by disciplinary power
because “law does not simply function in tandem with power formations” (Golder & Fitzpatrick, 2009, p. 56); rather, it “exists in a relational dynamic of mutual constitution with disciplinary power” (Golder & Fitzpatrick, 2009, p. 100), with both serving to constitute the other as “natural and necessary” (Golder & Fitzpatrick, 2009, p. 66).

The importance of Golder and Fitzpatrick’s analysis is that it illustrates the complex relationship between the disciplinary powers of the state and family law. In thus tracking law’s relationship to disciplinary power, they present a vision of a dynamic law comprised of two mutually significant dimensions: a determinate dimension, which expresses the definite content of law; this is the law on the side of the rule and the law that says no; and, a responsive dimension, which is the law that responds to what lies outside or beyond its position and is uncontainable. Golder and Fitzpatrick (2009) argue that these two constituent dimensions of law are necessary if law is to engage with resistance and transgressions (the ‘breakdown’ of the family in my analysis) and have something definite or ‘positive’ to articulate and enforce (‘equity’ between separating partners, the ‘best interests’ of the child). They also suggest that law needs to be able to respond to what lies outside of its definite content, while simultaneously requiring limits to this responsiveness. This, they argue, is the essence of the relation of law and disciplinary power – they do not exist as two fully formed and separate modalities of power; rather, they exist in a relation of ‘reciprocal constitution’ (Golder & Fitzpatrick, 2009, p. 61) wherein disciplinary and juridical powers coexist in a symbiotic relationship, with neither one reducible to the other. For Golder and Fitzpatrick (2009, p. 81), it is within the movement between these two dimensions that Foucault’s approach to law finds its unsettled place: “If there were an enduring fixity of law there would be no more call for law, just as if there were a pure responsiveness law would dissipate utterly.”

To summarise, Golder and Fitzpatrick’s (2009, p. 57) argument is that Foucault’s approach to law suggests that “matters are more intriguingly nuanced” than commonly implied in the expulsion thesis, and that different modalities of power “do in fact

43 This is closely connected with Foucault’s (2007, pp. 107-108) famous insistence that discipline and government do not so much overtake sovereignty, as operate with it in a triangular relationship:

(…) so we should not see things as the replacement of a society of sovereignty by a society of discipline, and then of a society of discipline by a society, say, of government. In fact we have a triangle: sovereignty, discipline, and governmental management, which has population as its main target and apparatuses of security as its essential mechanism.
subsist together and relate in some way." Law, they say, "cannot simply 'be' a positivist creature of certitude, delimitation and calculation", as it must be capable of "being something more than this, of being other to this determinacy, of being responsive’ (Golder & Fitzpatrick, 2009, p. 80, my emphasis). In this way, they enable us to see how family law is responsive, dynamic, and generative; its very essence is in its “non-essence, its very uncontainability and illimitability” (Golder & Fitzpatrick, 2009, p. 2). Hence the juridical powers invested in family law cannot be reduced to the disciplinary or coercive powers of the state, for while drawing on and underpinning them, they are also something else yet again, responsive to the wider currents of power/knowledge formation in society, in both its normative and more obviously ‘controlling’ aspects.

**Coda: On the minutiae of law**

In their discussion on the place of law in modern governance, Rose and Valverde (1998, p. 545) suggest the best place to start is not with law because there is no such thing as ‘The Law’:

Law, as a unified phenomenon governed by certain general principles is a fiction. This fiction is the creation of the legal discipline, of legal textbooks, of jurisprudence itself, which is forever seeking for (...) what will unify and rationalise the empirical diversity of legal sites, legal concepts, legal criteria of judgement, legal personnel, legal discourses, legal objects and objectives.

While acknowledging that there is no such thing as a unified phenomenon called ‘the law’, Rose and Valverde (1998) point to the manifold and concrete influences of the varied legal provisions embodied within ‘the law’ – provisions that cover constitutional, administrative and criminal law, as well as the body of civil law in which family law is embedded. Here they suggest that any full analysis of the role of law under conditions of modern governance needs to move away from the canonical texts and privileged sites of legal reason towards the “minor, the mundane, the grey meticulous and detailed work of regulatory apparatuses, (...)” (Rose & Valverde, 1998, p. 546). In this context, they introduce the notion of ‘spatialisation’, which they refer to as "the ways in which legal practices are involved in the constitution of what we can term 'governable spaces’ (Rose & Valverde, 1998, p. 549).

Two important points follow from Rose and Valverde’s suggestions. First, there is the importance of paying attention to the changing details of the juridical regulations embedded in family law over time. To return to my previous examples of the Poor Law
Amendment Act 1834, the Civil Marriage Act 1836, the Births and Deaths Registration Act 1836, and, in the contemporary context, the Family Law Act 1975, it is in the minutiae of the provisions relating to the continuing obligations and responsibilities of marriage that we see the capacity of law to shape the economic and social fortunes of separated wives and husbands. Second, and now with reference to the family dispute resolution process itself, we have what can be seen as a ‘governable space’ that works to regulate relations between separating couples; it is a space that has emerged for the identification and regulation of conduct, and where conduct is “indeed governed by law”, but also “by ways of thinking, regulating and enforcing that are very different from those usually associated with legality” (Rose & Valverde, 1998, p. 549). It is a space where law and disciplinary power operate in a symbiotic relationship, striving to set limits on how separating couples behave while also channelling their responses in particular directions.

Concluding reflections

In concluding this chapter, I bring together the key insights emerging from the theoretical literature so far discussed to provide a snapshot of the historical developments under review. My principle point is that Foucault’s account of law suggests an increasing penetration of law into the domain of the family as a privileged segment of governance. The trajectory of family law from Hardwicke’s Marriage Act of 1753 through to the enactment of the Family Law Act 1975, shows a distinct shift away from a disciplinary sanctioning role towards a more normative role, requiring detailed knowledge of the minutiae of everyday life. This reliance on information relating to the family, together with the broadening of law to encompass varied areas of married life, has created a law that appears to operate more and more in a normative fashion (Foucault, 1998, cited in Hunt & Wickham, 1994, p. 56). The role of the social sciences, as a kind of ‘intellectual machinery’ for government (Rose & Miller, 1992), is an important component in normative law’s ability to manage both the broad administration of family affairs and the potential for disagreement between partners at the time of divorce. As discussed, the significance of this ‘relation of reciprocity’ between the social sciences and government is evident in developments within family law culminating in Part VII of the Family Law Act 1975 as amended, which focuses specifically on children, and emphasises cooperative parenting, parenting plans, and dispute resolution services.
This move was accompanied and supported by a shift in the objects of legal regulation. Hardwicke’s *Marriage Act 1753* was set against property interests, and related to matters of legitimacy and inheritance. Its target was clandestine marriages and the threat they posed to wealthy families, and its broad directions were punitive. The Church of England had been unable to prevent clandestine marriage and required the support and sanction of state law to enforce the requirements of marriage and protect its sanctity. The seriousness of not complying with the Act was encapsulated in the first draft, where it left open the possibility that any minister conducting a clandestine marriage would be sentenced to “death by hanging”; this was later altered to “transportation for fourteen years” (Stone, 1990, p. 124). Tampering with the parish register remained a serious offence “punishable by death” (Stone, 1990, p. 124). Hardwicke’s marriage law, with its strict definition of marriage, supported by sanctions (over life and death), was evidently tied to the structures of sovereignty.

The mid-eighteenth century transition, from the structures of sovereignty towards techniques of government, saw law develop and broaden its scope in the detailed governance of the family, relying on tactics rather than direct control, though using laws as tactics. This transition is evident in the coming together of the *Poor Law Amendment Act 1834*, the *Civil Marriage Act 1836*, and the *Births and Deaths Registration Act 1836* where new methods of regulating the family were installed. Accurate and up-to-date data about the population was able to be collected, and this information aided law’s ability to manage family affairs. Law’s role in managing the family continued to broaden as demand for divorce grew throughout the twentieth century and law penetrated further into varied areas of birth, life and death, for example, from the moment of conception (such as, increasing foetal rights) through to the legal definition of death (such as, brain death or ‘body’ death) (Smart, 1995, p. 8).

There is, then, a progression whereby law has become, on the one hand, less evidently dictatorial, and, on the other, more minutely involved in family life. Its ability to invoke certain research findings from other disciplines to create a “very clear model of the ‘good’ post-separation family” exemplifies its adaptive power (Kaganas, 1999, p. 109). As Smart (1995, p. 11) points out, this involves the recognition of certain ‘truths’ and the exclusion of others: “the legal process translates everyday experience into legal relevances, it excludes a great deal that might be relevant to the parties, and it makes its judgement on the scripted or tailored account.” Hence, and critically, parties in family dispute resolution are not always silenced but “how they are allowed to speak, and how their experience is turned into something that law can digest and process, is a
demonstration of the power of law to disqualify alternative accounts" (Smart, 1995, p. 11). The way in which family law invokes certain research findings, while disqualifying others, to create a model for the 'good' divorce, is the focus of my next chapter.
Chapter Four

Shaping Parental and Gendered Responsibilities:

Law, Experts and the Family

In the last chapter I drew on the work of Michel Foucault in order to illustrate how the operations and tactics of governance intersect with law in the regulation and shaping of the family. In this chapter I take the discussion one step further by probing the alliance between law, experts and family. My analysis covers the role of the ‘best interests’ of the child principle and notions of ‘responsible parenting’ both in the broad sense, and as they particularly apply to separating families. The nub of my argument is that the relationship between law, experts and the family, in both its broad and narrower sense, constitutes a willing alliance rather than one unilaterally enforced on parents but that it is enforceable by law if and when parents desist. This chapter illuminates the way in which a particular way of thinking about divorce and the post-divorce family silences other perspectives. As already established, the dominant message of social science research into divorce is "taken to be that divorce is damaging to children" (Day Sclater & Piper, 1999b, p. 15: my emphasis), and that this damage is exacerbated by conflict.44 This is accompanied by the assumption that the damage "can be mitigated if particular forms of parenting and therapeutic interventions are put in place" (Neale & Smart, 1999, p. 38). The task for law is "to establish the rules and to make the decisions that will avoid or minimise this damage" (Kaganas, 1999, p. 110).

As my discussion of Foucault has illustrated, securing this kind of outcome cannot be left to law alone. Instead, it depends on a working union between the knowledge of experts, the rules of law, and the various institutions and practices of the state, wherein each promotes and reinforces the other in a relatively open and effective way. This

44 Many commentators such as, Day Sclater and Piper (1999b), Gilmore (2008), Trinder (2009), Rhoades (2010), and Fehlberg, Smyth, Maclean and Roberts (2011), make problematic the validity of the science behind the research that supports these assumptions.
chapter traces the combination of expert knowledges, legal measures and institutional factors that have combined to make this situation possible. My discussion is arranged under these three categories, and, given the intersections between them – also incorporates reference to their crosscutting nature. It involves a combination of theoretical and documentary sources, and concludes by considering the nature of the ‘best interests’ of the child, which emerges as a pivotal element in ensuring that ‘responsible’ parents will put their separate insights aside to reach an effective agreement on behalf of their child.

On expert knowledges – the ‘psy’

The insights of Donzelot

I start my discussion with Donzelot’s thesis on the ‘preservation of the family’, which tracks the emergence of the child as an object of concern for philanthropic and legal protection. His arguments not only provide in-depth insights into the formation of the law/experts/parent (particularly the mother) relationship, but also illustrate the different impact of this alliance on families in relation to their class. Over and above these insights, and most importantly, his analysis shows how the emergence of the ‘psy’ disciplines and the spread of normalising technologies, together with a series of legal measures, provide a way of managing private life without transgressing liberal notions of the minimal state or destroying the autonomy of the family.

For Donzelot (1979), the modern family was established through the diffusion of medical, educative and relational norms, where the overall aim was the welfare of the children. Like Foucault, he notes the shift towards governing through families, and depicts the modern family as the successful product of disciplining and normalising interventions. His thesis rests on the transformation of the family from the mid-eighteenth century in France where he tracks this ‘reorganisation of educative behaviour’ along two different channels – tutelage and contract – resulting from two quite different strategies, and differentiated by class. The first method ‘tutelage’ is reserved for working class families. The second method is ‘contract’ and involves the state establishing a bargain with bourgeois families whereby in return for adopting a lifestyle of thrift, discipline and domesticity they receive some assistance from the state through taxes and expert advice. Both working-class and bourgeois families were to be transformed through a focus on the preservation of children. The importance of
children is a key theme in Donzelot's analysis, as is the continued importance of the family for issues of governance.

Donzelot (1979) points out that from the middle of the eighteenth century an abundant literature began to flourish on the theme of the ‘preservation of children’. The image of childhood underwent a change and the ‘preservation of children’ became an important focus for government. This literature questioned the practice of foundling homes, the rearing of children by domestic nurses, and the artificial education of rich children: “These three techniques were accused of engendering, through their circular linkage, both the impoverishment of the nation and the etiolation of its elite” (Donzelot, 1979, p. 9). It was at this time that the government's perception of children shifted towards a more benevolent focus. What was required, it was decided, were better conditions for education. In evidence, Donzelot (1979) suggests that the working-class family was reorganised on the basis of a set of institutional constraints and stimulations which educated them to be responsible citizens under the tutelage of experts, while the bourgeois family received medical instruction from the doctor to free their children from the grip of domestic servants, avoiding coercive enforcement under threat of sanction.

As working class families had high rates of illiteracy, and generally could not afford the services of a family doctor, it was difficult to educate them through books or their family doctor. The government turned instead to ‘direct surveillance’ through corrective interventions aimed particularly at families seen to prejudice the honour, reputation, or standing of working class families (Donzelot, 1979, p. 23). A vital part of this story relates to the history of the foundling hospitals where unwanted newborn babies were abandoned. Parents could leave their babies anonymously by utilising ‘the turret’: a revolving cylinder with an opening on one side and a bell to alert the hospital that a newborn had been abandoned. Supporters of the turret acclaimed its function as a “kind of confessional that recorded the results of error and absolved it at the same time” (Donzelot, 1979, p. 26). Against this, authorities feared that foundling hospitals were being abused by poor families as a place to abandon their children and leave them to be cared for at the government’s expense relieving the family of responsibility.

The foundling hospitals had extremely high mortality rates (as high as ninety percent), and experts agreed that the cause of this was the lack of nurses and the general incompetence of the available ones. Accordingly, government aimed to consolidate “all forms of direction of the life of the poor, so as to diminish the social cost of their
reproduction and obtain an optimum number of workers at minimum public expense” (Donzelot, 1979, p. 16). The objective was not merely the conservation of children, but the production of physically efficient bodies and socially productive habits (Rose, 1985). What was set in place was a reorganisation of educative behaviour within working class families through the establishment of corrective interventions whose target was those individuals seen to have squandered the government’s vital resources.

In recognition of the failure of the foundling hospitals, family allowances were suggested as a way of aiding the mother to stay home and care for her children. This would amount to paying the mother the monthly wages formerly paid by the foundling hospital to a nurse. The child’s welfare became the focus for the family, particularly the mother. Family allowances came into being at the end of the nineteenth century, replacing the anonymity of the turret with an open office where the working class family were observed, scrutinised and guided by expert knowledge. The governmental programs and systems of regulation that were installed to regulate and control the criteria and eligibility for family allowance gave the government a way into the family and enabled a certain level of surveillance to be established.

As indicated, Donzelot’s second channel of transformation related to the bourgeois family, and involved a ‘system of contract’, which brought about an accelerated liberalisation of relations, both within and outside the family. These wealthy families had previously employed nurses to care for their children, but the nurses’ lack of goodwill towards wealthy families was deemed by experts to be the source of many of the children’s problems. What was required was to put an end to the misdeeds of domestic servants by “creating new conditions of education” (Donzelot, 1979, p. 16). The first educational strategy was the spread of household medicine and enhancement of the role of the mother within the family as executor of medical advice, and overseer and supporter of the children’s education.

From the late eighteenth to the end of the nineteenth century, doctors put together a series of texts concerning the rearing, education, and medical care of children of bourgeois families. The establishment of family medicine was dependent upon an alliance between the family doctor and the mother, which was beneficial not only for the mother and her family but also for the doctor as it “augmented the civil authority of the mother” and “furnished her with social status”, and was also considered to be the best means of foiling ‘impromptu doctors’ and the “resulting loss of power by the medical profession” (Donzelot, 1979, pp. 17, 21). Up until the mid-eighteenth century,
“medicine took little interest in women and children” as women had their own medicine, taking care of childbirth, breast-feeding and childhood illnesses, and whose “trace remains in the expression ‘old wives’ remedies” (Donzelot, 1979, p. 19). The dominant influence of these practices of ‘popular medicine’ was the main target of the medical profession in its alliance with mothers (Donzelot, 1979, p. 20). Doctors safeguarded their own role by encouraging mothers to look after the health and hygiene of their families under the doctor’s expert guidance, while discouraging them from concerning themselves with the health of others – reminding them that “the doctor prescribes, the mother executes” (Donzelot, 1979, p. 18).

The mother’s role was further enhanced with the formation of the first associations of parents’ and school children at the end of the nineteenth century. Parents, particularly mothers, were encouraged to be involved in the education of their children. What developed was a mixed education, which involved the family and the school, where “parents would prepare the child to accept scholastic discipline, but at the same time would see to it that good conditions of public education were maintained” (Donzelot, 1979, p. 22). The preservation of children thus provided the focus for the development of family medicine and education within the bourgeois family. The children were now under the parents’ observation, that is “the discreet but ubiquitous mother’s gaze” (Donzelot, 1979, p. 19), who were guided by the medical profession as they entered into an active and involved relationship with their child’s health and education.45

Significantly for my arguments about the importance of law as a tool of governance, these interventions were underpinned by a series of statutory measures. From the 1840s to the end of the nineteenth century, laws were passed concerning child protection, child labour, unsanitary housing, the contract of apprenticeship, the use of children by merchants and peddlers, the supervision of wet nurses, and compulsory education. In this way the state spread the normalising standards for protecting children through medical and educational instruction and institutional constraint supported by the force of the law. With this, official concerns came to rest on the large number of children dependent on family allowances, and the perceived lack of economic responsibility within the unmarried family. These considerations were accompanied by the moral campaigns for the restoration of marriage aimed at the

45 As Donzelot (1979, p. 21) observes, “It was the promotion of the woman as mother, educator, and medical auxiliary that was to serve as a point of support for the main feminist currents of the nineteenth century.”
working class. Donzelot (1979, p. 32) describes how, since the end of the eighteenth century, a multitude of philanthropic and religious associations had made it their goal to moralise the behaviour of the poorer classes and “facilitate their education by concentrating their efforts towards the restoration of family life (...)."

The promotion of the restoration of marriage combined the government's financial interests with its moral concerns, with the intention of creating a domain where responsibility and order prevailed. Donzelot (1979, p. 32) highlights this by citing a resolution passed by the Academy of Moral and Political Sciences in France in 1850, designed to promote civil and religious marriage among the poor:

When the man and woman of the people live in disorder, they often have neither hearth nor home. They are only at ease where vice and crime reign free. But on the contrary, once a man and a woman of the people, illicitly joined together, are married, they desert the filthy rooms that were their only refuge and set up their home. Their foremost concern is to withdraw their children from the hospitals in which they had placed them. These married fathers and mothers establish a family, that is, a centre where the children are fed, clothed, and protected; they send these children to school and place them in apprenticeship.

Marriage was promoted as shifting the disordered lifestyle of the unmarried person into an ordered home where ‘a family’ is established. This was to be the stabilised and moral centre where parents would be responsible for their children's day-to-day care, health and education. Interestingly, in this context in England, civil marriage in the form of the Civil Marriage Act 1836 was promoted as an alternative to the religious ceremony, a move that Parker (1990, p. 56) describes as, “the beginnings of an explicit secular movement to improve the morals of the working class.” It was a purely secular process that suited people who rejected the formality, costs and religious requirements of a church wedding. Carried out in a registry office by a civil servant, it was cheap and entirely free from publicity. Through its promotion, the administrators of poor relief were empowered with the responsibility of monitoring impending marriages, and controlling decisions about eligibility for welfare. Alongside this, philanthropists exercised a new form of moral and technical authority, which Donzelot (1979, p. 55) considers to mark a “deliberately de-politicising strategy for establishing public services and facilities at a sensitive point midway between private initiative and the state.” The task for this group of philanthropists was to change the nature of the welfare system in order to make it serve those who were in need of help, and no one else. In theory, what needed to be given was “advice rather than handouts”, and so, in
every request for aid, “one had to locate and bring to light the moral fault that more or less directly determined it” (Donzelot, 1979, p. 69).

Overall, Donzelot’s arguments suggest that the strategy of ‘tutelage’ involved the monitoring of working class families with particular sanctions and incentives to encourage responsible behaviour, whereas under the strategy of ‘contract’, middle class mothers, in alliance with health professionals, were encouraged to focus on the wellbeing of their children through a range of educative and health based strategies. While this class-based division has never disappeared, the progressive effect of twentieth-century developments has been to lessen demarcations on the basis of class and underline the universality of parenthood. It is to these developments that I now turn.

‘psy’ developments in the early and mid twentieth century

In illustrating how welfare and security of the child became a paramount concern for experts in the twentieth century, I touch on the ideas of John Bowlby (1952, 1953), writing on the importance of the ‘natural’ mother-child relationship in the early 1940s and the 1950s; and Goldstein and others (1973), writing on the importance of a ‘single psychological parent’ in the early 1970s. Taken together, these signify a shift from an emphasis on ‘maternal deprivation’ to a focus on a ‘clean break’ following separation, a move that has significance for divorce law reform. In grounding this theoretically, I turn to Rose’s insights into the formative role of psychology. Rose (1987, p. 70) follows Donzelot in believing that the transformation of the family “appeared as a positive solution to the problems of the regulation of morality, health and procreation posed by a liberal definition of the limits of legitimate state action.” These initiatives involved ‘complex alliances’ between private and professional agents, which were “formed around problems arising in a multitude of sites within the social body” (Rose & Miller, 1992, p. 191).

Expert knowledge on child development became crucial to legal decision-making during the twentieth century, and Bowlby’s work on ‘maternal deprivation’ was part of this conjuncture. His research coincided with the 1950s drive to produce the ‘ideal’ post-war family as a guarantor of social stability and cohesion to counteract the instability and fragmentation of the war years (Mitchell & Goody, 1999). The demand for labour in the immediate post-war years lead to an increase of women in paid employment, creating a certain level of economic independence for women and
changing the nature of the traditional view of male breadwinner and female homemaker. The immediate post-war reconstruction period was marked by “an intensified ideological ‘campaign’ to return women to their ‘natural place’ in the home, family and marriage” (Hall, 1980, as cited in Parker, 1990, p. 111). This campaign saw the development of procedures intended to accentuate the role of the mother, safeguard the wellbeing of children, and secure societal values on ‘normal’ family life.

During the 1930s, while working at the London Child Guidance Clinic, Bowlby carried out a series of investigations into the familial experiences of juvenile thieves and became convinced that there was a link between early separation from the mother and juvenile theft: “The effects of separation were to produce an ‘affectionless character’, and it was this character disorder that lay at the root of antisocial behaviour” (Rose, 1999a, p. 166). As Rose (1999a, p. 166) suggests, to put it another way, juvenile antisocial behaviour was considered to be a “symptom of a psychodynamic disturbance resulting from a disturbance in the child’s early relation with the mother.” A report commissioned by the Ministry of Health in England in the early 1940s into the treatment of mental health problems for the troublesome child, laid great emphasis on providing sites for expert intervention, such as child guidance centres, child psychiatric clinics, hostels for unstable or difficult children, and colonies for mental defectives (Rose, 1999a, p. 167). These sites offered a system of prevention and rapid treatment of the troubles of childhood.

Bowlby (1952) reinforced his warnings about ‘maternal deprivation’ in his post-war study for the World Health Organisation (WHO), where he reviewed a United Nations 1948 study of the needs of homeless children living in institutions throughout Europe and North America. He opens his report with the following claim:

> Among the most significant developments in psychiatry during the past quarter of a century has been the steady growth of evidence that the quality of the parental care which a child receives in his earliest years is of vital importance for his [sic] future health (Bowlby, 1952, p. 11).

Bowlby attributes a number of psychological and social ills to ‘maternal deprivation’, and emphasises that the biological mother-child relationship is crucial for the child’s emotional development. In his view, the father-child relationship is important but not so critical. In the conclusion to his report, he states: “mother-love in infancy and childhood is as important for mental health as are vitamins and proteins for physical health” (Bowlby, 1952, p. 158). Rose (1999a, pp. 167-168) suggests that what Bowlby sought to establish was “a set of unshakeable connections between mental health,
childhood, their social consequences, the tasks of government, and the role of expertise.” If the troubles of childhood were a warning of greater problems to come, and could be treated by early intervention, then what was required was an expanded project for the regulation of the relations between mother and child.

Rose (1999a, p. 168) argues that Bowlby’s discussion set the groundwork for two distinct but related axes along which the charting of the psychodynamics of childhood and personality would proceed: “The first was a new attention not to the gross features of the relations between mother and child but to its minutiae”, leading to expanding psychological research into the minutiae of mothering. The second axis was a refined psychoanalytic vision of childhood, using psychoanalysis as a theory of development with particular focus on the role of the mother in child development. In order to prevent maternal deprivation what was required was a comprehensive scheme of ‘mental hygiene’:

This would entail training on a large scale of professionals (physicians, nurses and workers) in the psychology and psychopathology of human relations, in the importance of unconscious motivation and how to recognise and modify it. Crucially it would be a family service. This would involve the treatment of children and the giving of expert advice to parents, especially mothers of young children, who had got into difficulties (Rose, 1999a, p. 169).

As I shall show later, Bowlby significantly influenced the way in which the legal concept of the ‘welfare of the child’ was interpreted from the mid-twentieth century up to the early 1970s. The bonds of love between mother and child were considered ‘natural’ and indissoluble and the family after marriage breakdown was to be organised around the importance of this relationship. The ground began to shift in the 1970s, with a move away from the sole focus on the mother towards a range of significant others. Important here is the work of Joseph Goldstein (lawyer, political scientist, psychoanalyst), Anna Freud (psychoanalyst), and Albert Solnit (paediatrician, psychiatrist). Integrating insights from their respective fields of expertise, the three argued that the welfare of the child is best served by a continuous, ‘quality’ relationship with one specific adult, their ‘psychological parent’ who need not necessarily be the mother, and if that continuity was assured children could survive the divorce experience well. It was not only the physical day-to-day care of the child that they considered important for the healthy psychological and social development of the child, but also the **quality** of that care and the child’s interactions with other adults including the father, the child’s siblings and their extended family, as well as the mother.
Significantly they argued that law alone is incapable of protecting a child’s best interests and that when a child’s placement is in dispute, and subject to competing and conflicting adult’s interests, law finds it difficult to find an answer because any decision requires a prediction about the child’s future. In their view psychoanalytic theory is the best way to make such a prediction as it provides a valuable body of knowledge “about a child’s needs which may be translated into guidelines to facilitate making decisions that inevitably must be made” (Goldstein et al., 1973, p. 6).

In more detail, they maintained that legal procedures, such as custody decisions around divorce that provide the non-custodial parent with the right to visit or force the child to visit, illustrated “the many determinations of law which run contrary to the often professed purpose of the decisions themselves – to serve the best interests of the child” (Goldstein et al., 1973, p. 6-7). As Rose (1999a, p. 212) comments, this promoted the view that the legal and the psychological were separate domains with the psychological above all concerned with the inner functioning of families and individuals:

(...) from this time forth, the ideal relation of psychological expertise to its subjects will be outside the legal domain, in the private contractual relations between individuals concerned about their families and experts seeking only to assist them in their search for adjusted selves, relationships and children.

Here, then, the concept of the ‘psychological parent’ is about the quality of the relationship between the child and the significant adult with whom they have day-to-day interaction, companionship, and shared experiences. An important qualification in determining ‘quality’ for these authors is a lack of conflict and irrational negative attitudes between adults. With this in mind, Goldstein and others (1973) argue for the notion of a ‘clean break’ or a ‘finalised’ separation after family breakdown to enable parents to go their separate ways, avoiding ongoing conflict and negative attitudes. As I shall show, the concept of a ‘clean break’ after divorce came to mean that the relationship was efficiently finalised between partners and parents, dissolving not only the marriage but also the family. Once the issue of custody allocation was decided parents were able to begin anew.

There is a long and chequered history behind this situation, a history that both reflects and reproduces social norms about the roles of parents, the different responsibilities of mothers and fathers, the nature of childhood, and the implications and permissibility of divorce. It is to the unfolding of this history that I now turn, starting with the ‘empire of the father’ in the seventeenth century.
Legal influences over time

Parens patriae and the ‘empire of the father’

As van Krieken (2005, p. 28) describes it, in the seventeenth century a child’s best interests were tied to the father’s interests, and “only disturbed reluctantly.” This was the time of the ‘empire of the father’, and mothers were “entitled to no power, but only to reverence and respect” (van Krieken, 2005, p. 28). During this period guardianship of a child fell under two types: guardianship by nature and guardianship by nurture. ‘Guardianship by nature’ related to securing a child’s inheritance and “applied to children who were heirs apparent to the family estate, almost always the elder surviving legitimate male child and lasted until he reached the age of 21” (O’Halloran, 1999, p. 11). All other children fell under ‘guardianship by nurture’, which was about parental duty of care. Guardianship by nurture still remained with the father except in certain circumstances when it became available to the mother, such as if the child was illegitimate or if the father had not appointed a guardian.

Throughout the seventeenth, eighteenth and nineteenth centuries, the position of a woman in marriage was subordinated to that of her husband. The husband acquired the right to control and manage his wife’s property after marriage, and any children of the marriage were legally recognised under common law as their father’s legitimate heirs. ‘Father right’ was so extensive that a wife who left her husband could be denied access to her children even after the father’s death. The right of the father to the custody of his children was so taken for granted and so absolute that it was not conditional on the quality of care offered to the child (Brophy & Smart, 1981). The headnote to the case of Cartledge v. Cartledge of 1862 forcefully indicates the extent of the father’s position: “The father is entitled at common law to custody of the child at its mother’s breast” (as cited in Dickey, 2002, p. 357). Maidment (2001) recounts that in an 1875 case, a husband who had committed adultery but who was not ‘continuing his immorality’, was allowed to keep custody of his three sons who were away at school. As Lord O’Hagan’s decision states:

The father’s right to the guardianship of his child is high and sacred. Our law holds it in much reverence, and it should not be taken from him without gross misconduct on his part and danger of injury to the health or morals of the children. Bad as the offence of adultery may be, there may be considerations of convenience and advantage to the children which, if injury to them be not likely to arise, should forbid their withdrawal from the father’s care (as cited in Maidment, 2001, p. 121).
In the late nineteenth century a landmark ruling asserting paternal rights stimulated women's political groups to seek ‘joint guardianship’ over their children through legislation (Maidment, 2001, p. 99; van Krieken, 2005, p. 28). In the case of Re Agar-Ellis in 1883 the English Court of Appeal held that a father continues to have control over the person, education and conduct of his children until they are twenty-one years of age (Parkinson & Behrens, 2004, p. 838). Significantly, the judge in this case, James LJ stated, “The right of the father to the custody and control of his children is one of the most sacred of rights”, prompting women to demand change in the law relating to equal rights to custody and control of their children (Maidment, 2001, p. 99; O’Halloran, 1999, p. 14). Though there was enormous public support for the principle of equal rights, “the majority of Members of Parliament (all men) were still not prepared to countenance a law whereby a mother could share rights of custody of her children during the father’s lifetime” (Maidment, 2001, p. 128). While the claim for joint custody failed, a compromise was put forward in 1885 allowing the court, on a mother’s application, “to make an order for custody ‘having regard to the welfare of the infant’, during the father’s lifetime” (Maidment, 2001, p. 128). This compromise was acceptable because it did not alter the father’s absolute rights while the marriage legally existed, and marked the beginning of developments in family law in relation to the consideration of the ‘welfare of the child’

Following from this, the Guardianship of Infants Act 1886 represented a milestone in recognising that questions of custody might turn on the ‘welfare of the child’. This was linked to wider social developments in the latter half of the nineteenth century relating to the care and protection of children. As earlier indicated, philanthropic child rescue initiatives saw orphanages and special schools established from the late 1880s. These had grown out of the framework that existed for the protection of animals when the Society for the Prevention of Cruelty to Animals “had turned its attention to the rescue of children from abusing adults” (O’Halloran, 1999, p. 46). As Maidment (2001, p. 101) highlights, “while the eighteenth century had created the concept of childhood, the nineteenth century had become the child’s century, in providing first voluntary and

46 As Maidment (2001) and van Krieken (2005) highlight, in practice a large proportion of children remained with their mothers. As Maidment (2001, p. 154) points out, unless fathers’ insisted on asserting their rights to custody, “the Victorian ideal of wifely domesticity would probably have resulted in most women taking their children with them, despite the official and legal recognition of paternal rights to custody.”
philanthropic and later legal protection for children.” In 1884, the charitable organisation, the London Society for the Prevention of Cruelty to Children, was formed to protect children from neglectful parents. Charitable organisations rescued many children,⁴⁷ and were supported in their efforts by the enactment of laws relating to the welfare of children such as the Guardianship of Infants Act 1886, Custody of Children Act 1891, Prevention of Cruelty to Children Act 1889, 1894, 1904 and the Children Act 1908 – which abolished the death penalty for children, as well as introducing ‘Borstal institutions’.⁴⁸ By 1918 the Education Act was implemented which “prohibited the employment of children aged twelve to fourteen in factories”, raising the school leaving age to fourteen and making education freely available for all children (O’Halloran, 1999, pp. 51-52).

In the early twentieth century the Guardianship of Infants Act 1925 elevated the welfare principle to the ‘the first and paramount consideration’ in all cases concerning children which came before the English courts. Commenting on this, Viscount Cave declared that, “it is the welfare of the children, which, according to rules which are now well accepted, forms the paramount consideration in these cases”⁴⁹ (as cited in Chisholm, 2002, p. 87). The rule was repeated and developed in English decisions, and picked up in legislation dating from the 1920s, and can be broadly understood as concerning the emotional, physical and moral welfare of the child. It was to be found in Australia, in slightly different forms, in early state legislation dealing with custody, guardianship and access. For example, in the Infants Custody and Settlements Act 1899 (NSW) the welfare of the child was to be the ‘first and paramount’ consideration. The welfare principle did not affect the basic rule of common law that the father had absolute rights over his children. What it did was to “impose a role of neutrality between mothers’ and fathers’ claims to their children”, and gave the mother the “unlimited right to apply for custody and access” (Maidment, 2001, p. 107). The principle was carried through to the Matrimonial Causes Act 1959, which governed custody proceedings in Australia that

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⁴⁷ Many such children were sent overseas or for adoption by those organisations (O’Halloran, 1999, p. 49).

⁴⁸ Borstal institutions were seen as an alternative to prison for young male offenders.

were ancillary to a marriage. It has always been part of the Family Law Act 1975, and is implicit today within the Act at Part VII as 'the best interests of the child'.

While the Guardianship of Infants Act 1925 remains a landmark in the development of the law's protection of children's welfare in Australia, it also occupies an ambiguous place as far as the rights of women and mothers are concerned. The women who had fought for it and for a change in parental rights law did so on the basis of their rights as mothers, believing "that their own enhanced rights would be in their children's interests too" (Maidment, 2001, p. 150). Against this, the effect of the Guardianship of Infants Act 1925 was to shift the debate away from the issue of women's rights, because parliamentarians considered the demand by women for their rights as a threat to the wider societal values on 'normal' family life. With this in mind, they attempted to diffuse the rights issue by acknowledging a certain level of neutrality between parents by broadening the scope of the term 'custody' to include equality of parental right to custody or upbringing, as well as granting an equal right to apply to court on any matter affecting their child. The Act also included a "specific right for the mother to apply for custody, even if still resident in the matrimonial home" (O'Halloran, 1999, p. 42).

With this, a second intention of the Act was to codify the welfare principle, already developed and operated by judges, as the 'first and paramount consideration' in all cases concerning children. This meant that all custody claims were to be governed by the 'welfare principle', with an emphasis on judicial discretion due to the 'indeterminacy' of the principle. The indeterminacy of the welfare principle and the emphasis on judicial discretion required judicial interpretation in each instance, and this "would depend largely on the judge's perceptions, but these would of necessity be of a changing nature and reflect wider societal values and understandings" (Maidment, 2001, p. 140). This has been well demonstrated by subsequent developments, which have seen an expansion of considerations relating to the welfare of the child.

50 FLA s 60CA In deciding whether to make a particular parenting order in relation to a child, a court must regard the best interests of the child as the paramount consideration. The primary considerations that determine what is in a child’s best interests are listed at s 60CC.

51 The 'indeterminacy' of the welfare principle means that it lacks consensus, and, as such, relies on judicial interpretation in each instance.
The expansion of considerations on the welfare of the child

By the 1960s the principles of welfare were seen as representing and facilitating ‘coercive paternalism’ on the part of the state (Rose, 1999a). The increase in women’s access to education, employment and the ability to manage birth control were significant social aspects that were changing the way people thought about parenting, the role of the mother, and family privacy. Civil libertarians were arguing that “paternalistic powers assumed by the state and its agencies amounted to illegitimate intrusions into the private realm of the family, incursions that should be prevented by the legal recognition of family privacy” (Rose, 1999a, p. 209). These arguments were expressed under the banner of ‘family rights’ and ‘children’s rights’. Civil libertarians, together with experts of child welfare, argued that these “attempts to protect children under such a ‘welfare’ approach simply did not work”, not only because of the lack of precision and framing of what types of family conduct, or misconduct, required intervention, but also because the ‘norms’ that families were judged by “were highly cultural specific” (Rose, 1999a, pp. 209-210). As Rose (1999a, p. 211) points out, “the regulatory apparatus coercively imposed upon women certain doctrines of motherhood, of the naturalness and desirability of women adopting a domestic and maternal role”, and these ‘norms’ were bolstered by “dubious psychological theories of maternal instinct, mother-child bonding, and primary preoccupation.”

The task of reform was taken up in the 1970s with the turn to a co-parenting model of post-separation parenting and its corresponding attempt to insulate children from the “emotional heat of divorce” (van Krieken, 2005, p. 33). The notion of a ‘clean break’ and the demise of matrimonial fault in family law created a new framework for dealing with family breakdown limiting the grounds for coercive intervention into the family domain. This shift incorporated a non-judgemental perspective on the breakdown of marriage, shifting the focus of family law from the status of marriage to the status of parenthood, and this shift was tempered with modern insights from behavioural and social sciences. Children’s interests were to be the primary concern of the family law process, and parental ‘responsibility’, regardless of the status of marriage, the main consideration in divorce matters. As documented in Chapter Two, the new family court was designed “to provide for the reduction of bitterness and distress and the alleviation of on-going divorce problems” (Astor & Chinkin, 2002, p. 17), while under the Family Law Act 1975 parties in dispute were being encouraged to utilise forums to reach agreement on matters relating to their children and avoid ongoing conflict.
Subsequent to the enactment of the *Family Law Act 1975*, the main innovations of the *Family Law Reform Act 1995* were centred on Part VII of the Act, which deals with children, and, as previously highlighted, were directly influenced by the United Nations Convention on the Rights of the Child. As previously discussed, there is now recognition within the *Family Law Act* of the rights of the child in the form of their right to know and be cared for by both parents and their right to contact on a regular basis with both parents, and these rights are now expressed as principles underlying the object of the part of the *Family Law Act* which deals with children. The objective is to ensure that children receive adequate and proper parenting. There is also a corresponding shift from parental *rights* to parental *responsibility*. Parental responsibility includes a focus on 'joint parenting' irrespective of divorce and encourages parents to reach agreement with regard to future parenting arrangements for the sake of their child.

I note here that the public debates surrounding Australia’s ratification of the Convention on the Rights of the Child expressed concerns about the elevation of ‘children’s rights’ and the resulting erosion of parental rights, and the circumstances in which governments could intervene in family relationships. However, as previously established, law will only intervene when the family is failing to discharge its functions as a ‘resource distributor’, particularly to the children (Dewar, 1998a; Eekelaar, 1989). Writing on the impact of the Convention on family law in Australia in 1992, Otlowski and Tsamenyi (1992, pp. 20-21) clarify that the Convention only seeks to uphold children’s rights over the rights of parents, “in circumstances where the parties are patently not acting in the best interests of the child”. They make the significant point that the Convention “in no way authorises governments to displace or interfere with the responsibility of ordinary families in the nurture and support of their children” (Otlowski & Tsamenyi, 1992, pp. 20-21).52

Significantly, and as previously highlighted, under the current *Family Law Act* parents are treated as a *unity* and no distinction is made between mothers and fathers. Drawing out the implications of this, Bren Neale and Carol Smart (1999) point out that what has been transformed within legal and policy discourse is the constitution of fatherhood.

52 As outlined in Chapter Two, in line with the language of the Convention, the *Family Law Reform Act 1995* introduced a change in terminology replacing the terms ‘custody’ and ‘access’ with ‘residence’ and ‘contact’, and the ‘welfare principle’ with the ‘best interests of the child’ principle, which has taken on a new form in these reforms. Instead of locating the ‘best interests’ principle in an over-arching provision it is now repeated several times in relation to specific matters (Young et al., 2013).
Fathers are now considered to be the ‘restabilisers’ of the post-divorce family, ‘potential carers’ for the children, and as ‘essential’ in their children’s lives, “at least following divorce” (Neale & Smart, 1999, p. 39). Any unwillingness by mothers to share their children is “seen as discriminatory against fathers”, and any claims mothers make “to their children on the basis of their caring abilities can be seen as selfish” (Neale & Smart, 1999, p. 39). Though mothers are no longer considered in legal discourse to be vital to the day-to-day care of their children, Neale and Smart (1999, p. 41) make the observation that a father’s direct involvement with his children is still ‘at his discretion’ and “if he opts out, there are no legal sanctions against him.”

The shifts in expert knowledge and legal intervention outlined above do not take place within a political and social vacuum, but as endorsed and practiced by the various institutions of the state. The point is an obvious one. What is not so obvious is how the rationalities underpinning these institutions have changed over time, and how this in turn impacts on the legal and expert practices impinging on the family. It is to this broader canvass of considerations that I now turn.

On the rationalities and practices of the state’s institutions

On the notion of governmental rationalities

Theorists such as Dean (1999) and Rose (1993) suggest that since the mid-twentieth century the most significant shift in rationalities of government is that between ‘welfarism’ and ‘advanced’ or ‘neo’ liberalism’. Critically, Rose (1999b, p. 142) also points out that we need “to avoid thinking in terms of a simple succession in which one style of government supersedes and effaces its predecessor.” There is, rather, a greater complexity, with “the opening up of new lines of power and truth, the invention and hybridisation of techniques” (Rose, 1999b, p. 142). As far as the broad definition of ‘liberalism’ is concerned, Dean (1999, p. 49) suggests that rather than viewing it as a philosophy based on the ‘rule of law’ and the protection of individual rights and freedoms against the unnecessary encroachments of the state, we should approach it as a “characteristic way of posing problems.” Further:

The variant forms of liberalism – and indeed of neo-liberalism – stem less from fundamental philosophical differences and more from the historical circumstances and styles of government which are met by a certain form of critique, an ethos of review and a method of rationalisation (Dean, 1999, p. 58).
From the early twentieth century, the classical laissez faire form of liberalism was subjected to a series of problematisations and critiques relating to the ‘social question’ (Dean, 1999). Government first responded in seeking to “work through a mass voluntary commitment to bettering the quality of family life” (Dean, 1999, p. 53). Rose (1996) suggests that this was the condition for the emergence of a specific rationality of government that might be called welfareism. His argument is that this was not so much a matter of the rise of an interventionist state, as the re-establishment of the integration of individuals into a social form. Under it, the state was to be transformed into a ‘centre’ that could “program – shape, guide, channel, direct, control – events and persons distant from it” (Rose, 1996, p. 40). Under Rose’s trajectory, the late nineteenth and early twentieth century ‘socialisation of the state’ saw a recalibration of governance as it strove to govern better and address the perceived failings of classical liberal governance. Its central problematic concerned the management of the economic and social affairs of individual citizens in the name of collective security without adopting the mechanisms of an overtly authoritative and interventionist state.

An important shift occurred with the emergence of the welfare state in the mid-twentieth century. Now disciplines such as social work, social policy, social administration and social science enabled “persons and activities to be governed through society, that is to say, through acting upon them in relation to a social norm, and constituting their experiences and evaluations in a social form” (Rose, 1996, p. 40, original emphasis). The authority of the experts of the social, “as those who can speak and enact truth about human beings in their individual and collective lives” was expressed through the vital relays linking political objectives and personal conduct by means of “persuasion, education and seduction, rather than coercion” (Rose, 1996, pp. 48, 50). Referring to Foucault’s notion that the family became an increasingly important instrument of governance, Rose (1996, p. 49) shows how family was ‘instrumentalised’ “as a social machine both made social and utilised to create sociality – implanting the techniques of responsible citizenship under the tutelage of experts in relation to a variety of sanctions and rewards” (original emphasis). Everyday activities were now subject to expert opinion – calculated, judged and “subject to regimes of education and reformation” (Rose, 1996, p. 49). The individual and the family were to be “simultaneously assigned their social duties, accorded their rights, assured of their natural capacities, and educated in the fact that they need to be educated by experts in order to responsibly assume their freedom” (Rose, 1993, p. 13).
This is well reflected in the laws governing the behaviour of the post-divorce family. When the *Family Law Act 1975* abolished the ‘fault’ concept at divorce, and shifted the focus of family law to the impact of divorce on the family, particularly the child, it created a complex apparatus of services, where a range of experts working at arms length from formal government bureaucracies were to manage individual and collective conduct. In this way, social workers and marriage guidance counsellors were able to relay their deliberations into what Rose (1996, p. 49) calls “a whole variety of micro-locales” – these included welfare agencies, relationship centres, community support services, social security offices, child protection services, therapeutic services, clinics, schools, hospitals and the courtroom – where the “conduct of the citizen could be problematised and acted upon in terms that calibrated personal normality in a way that was inextricably linked to its social consequences.” As previously noted, in this ‘welfarist’ context experts encouraged family reconciliation over family separation in the first instance. Where reconciliation was not possible the divorcing family was to be re-established into the separated or post-divorce family – a different social form supported through social interventions, such as social security and other social service departments, in an attempt to avoid economic insecurity and social instability. These interventions depended on strategies that allowed the particular problems created by family breakdown and divorce to be transformed into matters subject to rational knowledge and professional expertise.

From the 1980s onwards critics of the welfare state alleged that it had “deleterious consequences for public finances, individual rights and private morals” (Rose, 1996, p. 40). This, in tandem with the move from Keynesian to neo-liberal economic management, produced the new formula of rule that Rose describes as ‘advanced liberalism’. Rather than governing in the name of the ‘social’, advanced liberalism acknowledges the internationalisation of economic relations and attempts to govern particular spheres of economic interest in the name of economic efficiency and economic freedom. With this move to ‘de-socialisation’, governance works more through the regulated choices of individual citizens, within an organised but “loose assemblage of agents, calculations, techniques, images and commodities” (Rose, 1992, p. 155). There is a break with welfarism at the level of moralities, explanations and

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53 In the specific context of family problems, Houlgate (1988, p. xi) thus argues that the welfare approach was giving too much attention to “protecting the rights of individual family members (children) and not enough to the rights of the family to make its own decisions and control its own destiny.”
vocabularies: “Against the assumption that the ills of social and economic life are to be addressed by the activities of government, (advanced liberalism) warns against the arrogance of government overreach and overload” (Rose & Miller, 1992, p. 198). State paternalism is seen to have a morally damaging effect upon citizens, producing a ‘culture of dependency’ based on expectations that government will do what in reality only individuals can. In thus articulating a more active citizenship, advanced liberalism reactivates liberal principles. At the same time, it presses that the state must secure the nation’s interests internationally, and, crucially in this context, to ensure the legal safeguards for an orderly society:

The state must be strong to defend the interests of the nation in the international sphere, and must ensure order by providing a legal framework for social and economic life. But within this framework, autonomous actors – commercial concerns, families, individuals – are to go freely about their business, making their own decisions and controlling their own destinies (Rose & Miller, 1992, p. 199).

In explaining such shifts in rationality, Miller and Rose (1990, p. 4) point out that governmentality is characterised by an ‘eternal optimism’ that reality is in some way programmable. With this notion, the ‘failure’ of one policy or set of policies is always linked to attempts to devise or propose programmes that would work better. Seen this way, advanced liberalism can be interpreted as the attempt to invent new strategies of government that would overcome the problems of dependency and debt, which critics had attributed to welfare, through transferring the authority of the older experts of human conduct to the new “calculative regimes of accounting and financial management” (Rose, 1996, p. 54). Under this regime, the state is to “maintain the infrastructure of law and order”, while citizens “promote individual and national well-being by their responsibility and enterprise” (Rose, 1999b, p. 139). For the family, this signifies the shift whereby parents are no longer to be dependent on the state, but responsible and active in their own self-governance within a state-secured framework of law and order (Rose, 1999b).

Other important changes accompanied this move. Previously, as Rose (1996, p. 50) observes, experts were safeguarded by the “relatively bounded locales or fields of judgement within which their authority [was] concentrated, intensified and rendered difficult to countermand”, and these enclosures effectively insulated them from external political attempts to govern them and their decisions and actions. In counteracting this, advanced liberalism developed “a range of techniques for exercising critical scrutiny over authority – budget disciplines, accountancy and audit being three
of the most salient” (Rose, 1996, p. 54). With this came a certain restriction in the discretionary powers available to the family law process. Up to the mid 1990s these powers were relatively broad, to be determined by reference to welfare considerations. Dewar (1998a) suggests, that from this period on, a growing dissatisfaction with expert adjudication led legislators to reduce the discretionary content of family law and tilt towards something more constrained. He argues this led to a slow and uncertain shift towards a ‘post-liberal’ family law, “in which prescriptive rules are more prominent” (Dewar, 1998a, p. 232). The reasons for this trend, according to Dewar (1998a), include the costs, both internal and external. The internal costs are associated with the resolution of disputes, while the external costs include state expenditure on welfare benefits for family members following a relationship breakdown. Here Dewar (1998a, p. 233) comments that:

The family is increasingly seen as the primary source of economic support for its members and as a means of their socialisation: and the shift to rules can be seen as part of this process, as a way of ensuring that the family properly discharges these functions.\(^{54}\)

Significantly, Dewar (1998a, p. 232) also argues that the reason for the shift towards the rule-like end of the spectrum reflect lawmakers’ own anxiety to use family law as a way of “instilling family values back into the population at large in the face of a perceived crisis in the family itself.” He comments further that:

If it is now the case that discretion is being reduced, and that legislators are more confident in prescribing rules of proper familial behaviour, then we need to ask what vision of family relations is being established, or imposed, under a more rule-based regime (Dewar, 1998a, p. 233).

Interpreted this way, the shift to rights and rules in family law can be seen as an attempt to define and make clear what social values are being projected and reaffirmed. Importantly, this is not to reaffirm traditional social values, but rather to ‘radiate the message’ of divorce as merely a transition in the family life cycle (Day Sclater & Piper, 1999b). That is, to normalise divorce as “simply an event in the family life cycle” rather than marking the end of, or the decline of ‘the family’ (Day Sclater &

\(^{54}\) As established in the Introduction, Eekelaar (1989) illuminates the role of the family as a ‘resource distributor’ and how this distribution system (particularly to the children) is dependent on the healthy functioning of the family. He makes the point that it is only when the family is disrupted, for example through marital breakdown, that government will intervene through a series of legal and behavioural interventions to strengthen the ties of responsibility between parents and children.
Piper, 1999b, p. 11). Following Galanter's (1992) observation that law 'radiates messages' rather than imposing physical coercion, commentators in Australia have argued that the Family Law Reform Act 1995 was clearly intended to change people’s attitudes as it 'radiates messages' about how to divorce well, or how the fragmented family should re-form itself (Chisholm, 1996; Dewar, 2000a; Dewar & Parker, 1999). Its terminology thus emphasises that the relationship between each parent and child is a continuing one, and survives after divorce. Divorce is thereby presented as an opportunity to restructure families and to preserve 'the family' paving the way for the new post-divorce family to emerge. As Parkinson (2011, p. 184) puts it:

In the new conceptualisation of post-divorce parenting, the family does not go through a death so much as a metamorphosis from a nuclear household to become a family in two locations, with new relationships extending the range of adults and children associated with that family. If the family is understood to be enduring in spite of the breakdown of the parents' relationship, then the improvement of the relationship between parents so they will be more likely to co-operate into the future emerges as an important goal of services to support families following separation.

As an important feature of this move, the family court is mandated to refer disputes involving children to the dispute resolution process. This underpins a shift towards the use of apparently informal yet highly governed sites, where the law works in cooperation with various behavioural specialists to bring about a satisfactory and binding resolution for separating parents. Here family dispute resolution exists within a state-secured legal/expert framework for managing the norms of conduct at family breakdown. It also reflects the notion that separating families need to be able to make their own decisions and control their own destiny within a state secured legal framework. As previously highlighted, the conditions under which these decisions are made are well regulated and tied to appropriate conduct, or self-control, and limited only by the hidden mechanisms of law. In short, the apparently informal yet highly governed interventions of family dispute resolution are where law, expertise and the family come together with the aim of ensuring that the economic consequences of divorce and the welfare of any children to the relationship remain the responsibility of the risk-assessed parents rather than the state.

In broad terms, these developments can be seen to take place within the conjuncture of welfarist and advanced liberal principles. Welfarist rationalities are ultimately represented in the Family Law Act's paramount principle of 'the best interest of the child'; while advanced liberal rationalities are present in the focus on the responsibility
of parenthood and the management of risk. This conjuncture between welfarism (with its focus on protecting the vulnerable) and advanced liberalism (with its focus on responsibilities and the calculation and management of risk) generates a space whereby separating adults are expected to act as autonomous and responsible adults in issues relating to family breakdown, but where, if they fail to do so, the ‘best interests of the child’ principle allows the state to act in a directive fashion. In the system of mediation established under family dispute resolution there is a layering of expectations in which responsibility and consensual agreement are seen to be good, and conflict and disagreement bad. The child is at the centre of this discourse, and the responsible parent, by definition, is one who looks first and foremost to the ‘best interests’ of that child. As Day Sclater and Piper (2001, p. 409) point out, the principle is “a pervasive notion in law and the welfare discourse within which it acquires its meaning has become increasingly dominant in our culture’s stock of ‘common sense’.” It is to this notion and its implications that I turn in the concluding part of my discussion.

The ‘best interests of the child’: a seemingly flexible notion

Van Krieken (2005) suggests that the ‘best interests’ standard has always been understood as being both based on and limited by the protection of the child’s ‘welfare’ or ‘best interests’. What has been subject to change, he suggests, is:

The judicial and legislative construction of exactly how those ‘best interests’ are to be understood, as well as how they are to be positioned within a nexus of other interests, of the father, the mother, ‘good government’, and of society more broadly (van Krieken, 2005, p. 27).

While children’s ‘best interests’ are now the primary concern of the family justice system, the principle can be seen as a ‘concept in search of a meaning’ with no clear specific content. Day Sclater and Yates (1999, p. 272) argue that this indeterminacy “permits decisions to be made which are in accord with specific interests of individual children.” These general assumptions and expectations, of what it is that best furthers the interests of children at divorce, set the parameters in decision-making at divorce potentially limiting or silencing other views and voices:

It is widely thought, for example that children’s adjustment to divorce is best facilitated if they can maintain relationships with two parents who are in harmonious contact with each other. These assumptions are reflected in
both research into the ‘effects’ of divorce on children and divorce dispute resolution practices (Day Sclater & Yates, 1999, p. 272).

This focus on the child, according to Théry (1986, p. 79), not only entails the promotion of a variety of norms about what constitutes their best interest, it also “constitutes a norm itself.” She points out that in law ‘best interests’ acts as a “principle for regulating the post-divorce family” by developing a general image of what the ‘good’ post-divorce family organisation should be (Théry, 1986, p. 345). This, she contends, enables law to view the child within the context of a system of relationships, focusing not on the life of the child but on “the totality of the familial arrangements after divorce”; in other words, the ‘best interests’ standard “acts as a principle for regulating the post-divorce family, possibly even to the detriment of the infant in the case” (Thèry, 1986, p. 345). The point has far-reaching implications:

To admit that the real function of ‘the interest of the child’ is to permit the setting up of a reorganisation of the family unit after the marital breakdown is entirely pertinent. Far from being a detour, it is the very heart of the matter. Thus we must analyse how such a reorganisation is achieved, how it is justified and what this means for the representation of paternal and maternal roles (Théry, 1986, p. 345).

Within this framework, the child is seen as vulnerable to the negative impact of conflict and divorce, with her welfare requiring “the removal of reasons and opportunities for parents to ‘fight’ over their divorce and arrangements for children” (Day Sclater & Piper, 2001, p. 421). Accordingly, and as previously indicated, divorce is divided into the ‘good divorce’, where parents agree about the future organisation of the family; and, the ‘bad’ divorce, where they are in conflict and unable to agree (Day Sclater, 1999a; Théry, 1986). As Piper (1996, p. 79) observes:

This focus on the child not only entails the promotion of a variety of norms about what constitutes their best interest but also constitutes a norm itself. The ‘good’ parent relegates his or her own interests to second place and does not oppose arrangements which put these norms into practice: the converse is that parents who do otherwise are ‘not’ good parents.

With this, there is little room to acknowledge the difficulties adults face in the wake of their relationship breakdown, for the focus on caring for the child has become the ‘compulsory norm’ ruling out adult’s expression of their own emotions. As Day Sclater (1999a, p. 183) observes, the discourse of the ‘good’ divorce “serves to sever the chaotic and destructive feelings and parts of ourselves from the rational and manageable parts of ourselves, with the former being driven underground.” In this way,
dispute resolution practices impose “prescriptions for behaviours which foreground our rationality at the expense of our emotions” (Day Sclater, 1999a, pp. 182-183). How, though does this happen? By dint of what particular mechanisms and persuasions? Such is the subject of the next chapter, where I consider how the mediation process within family dispute resolution manages the chaotic emotions of divorce and circumscribes the passions.
Chapter Five
Understanding the Civilising of Parents: The Insights and Limitations of Elias

As a child, learn good manners.
As a young man, learn to control your passions.
In middle age, be just.
In old age, give good advice.
Then die, without regret.\(^{55}\)

This chapter sets out from the problem of how to explain the particular form of social orderliness in human interaction that persists in mediation within family dispute resolution despite the stress of family breakdown and divorce. In Chapter One I set out an imagined representation of mediation whereby divorcing parents Kate and Harry successfully reach agreement on issues of disagreement and conflict, setting up a formalised parenting plan for how they intend to manage and share their future parenting arrangements for their daughter Iris. During the course of the mediation process both parents experienced times of heightened emotion, yet they chose to moderate their emotions and maintain a certain level of good manners, or self-control. Hence the task of this chapter is to understand how, in the midst of the chaos, conflict and unpredictable emotions of family breakdown, we have come to be at a place whereby the external mechanisms of social control need no longer be visible for individuals to still choose to moderate their own emotions.

According to the Australian Bureau of Statistics (2014), in 2012 there were 49,917 divorces granted in Australia, an increase of 2.0% compared to the previous year. The crude divorce rate in 2012 was 2.2 divorces per 1,000 of the estimated resident

\(^{55}\) Maxim inscribed on the base of a funerary monument dedicated to Kineas of Ai Khanum in the third century BCE (before the Common Era). It was a gift to Kineas from Clearchos (a student of Aristotle).
The number of children involved in divorce increased from 43,867 in 2011 to 48,288 in 2012 but the average remained the same at 1.9 children per divorce from 2008 to 2012. In 2011, one out of approximately two divorces (48%) granted in Australia involved children under the age of 18 years of age.

Given the primacy attached to the family unit, normatively, socially and emotionally, and the significance of the intact family as a source of emotional, practical and financial support, divorce is often considered to be one of the most stressful of all life events. As Dewar (2000a, p. 79) observes:

(...) family issues are perhaps the ones that generate more passion, intensity of feeling and disagreement than any other. It is a realm in which big ideas are in play, where the passions are engaged and in which the stakes are high for us all.

The breakdown of the family unit can have long-term emotional and economic consequences for those involved. Not only are couples dealing with the disintegration of the emotional investment they once made in their intimate relationships, they are also confronted with other stressful issues such as the possibility of losing their home, the impact on their finances, the potential loss of extended family, friendships and communities, concerns about the day-to-day parenting of their children, the loss of their imagined future, and in some cases, a sense of a loss of control over the whole situation. At the same time as they are dealing with these stresses, divorcing parents with children under the age of 18 years of age also have to manage the legal requirements of the divorce process relating to the care, welfare and development of their children. As the representation of mediation in Chapter One signifies, and as I will signal at various points in the discussions, these consequences are likely to have different impacts on women and men, mothers and fathers.

My main issue, as flagged, is the ways in which an orderly agreement is reached in mediation at a potentially chaotic time. In exploring this, I will preface my account with some comments on the insights of Norbert Elias, who, as Alan Hunt (2012, p. 142) suggests, proposes a ‘controlled decontrolling of emotions’, in which the civilising process ‘is manifest in a generalised way such that an internalised self-control has been firmly established in a way that emotional spontaneity no longer poses any risk to

56 The crude divorce rate is calculated as the number of divorces granted during a calendar year per 1,000 estimated resident population at 30 June of the same year.
civilised conduct.” For Elias, there is always some form of social orderliness to social interaction, and this orderliness relies on our ability to civilise our own behaviour. His ideas on the ‘civilising process’ thus offer a way to understand how behaviour, and in particular emotions, are managed – or moderated – at the time of separation and divorce. Following my discussion of Elias, I will return to the formalities of the legal process, and the more intimate context of mediation within family dispute resolution.

The contribution of Elias

In his book on Norbert Elias, Robert van Krieken (1998, p. 50) points out that, “Elias sets out from the problem of how to explain the orderliness of social life, and sees sociology as fundamentally concerned with a ‘problem of order’.” Elias’s interests in the particular form that social life takes, even in ‘chaos or degeneration’, was informed by witnessing firsthand the violent and rationally organised takeover of power in Germany by the Nazis. As Mennell and Goudsblom (1998, pp. 2-3) observe, it would be difficult to appreciate the depth of Elias’s work without taking into account that he was an eye-witness to the violence and the social, political, and economic turmoil in Germany from the fall of the Kaiser’s regime up to and beyond Hitler’s accession to power:

The theory of civilising processes, far from being a celebration of the Western way of life, was developed out of Elias’s urgent need to understand how the thin veneer of what people had come to think of as ‘civilisation’ came to cover and disguise the powerful forces of conflict and violence not far beneath the surface (...).

Elias makes the point that what we experience as ‘civilisation’ changes over time and can only be understood in connection with changes in broader social relationships. It was important, he argued, for social scientists to try to “develop a ‘way of seeing’ that went beyond current ideologies and mythologies” (van Krieken, 1998, p. 7).

For Elias, all human relationships are ‘relations of power’ (van Krieken, 1998, p. 63), and at the core of this perspective is the central notion of ‘interdependence’, that is, “the manifold ways in which people are bonded to each other, in co-operation as well as in conflict” (Goudsblom, 1987, p. 330). In order to understand the pervading power balances and ratios in all social relations we need to see individuals in their social context, within a network of social relations or ‘figurations’, where they develop a socially constructed ‘habitus’ or ‘second nature’. Elias (1978, p. 129) used the term
‘figuration’ to draw attention to people’s interdependencies, as a way to understand ‘the individual’ and ‘society’ as “two different but inseparable levels of the human world”, that is, to think of people as “individuals at the same time as thinking of them as societies.” Arguing against the individualistic and static image of homo clausus (the ‘closed person’), and the philosophical conception of the mind as ‘internal’ and sharply demarcated from the external world, Elias proposed an alternative image of homines aperti (‘open people’), where we see human beings in their web of social relationships, or figurations, with each other. The human being is not simply a ‘closed container’ but is organised by nature as part of a larger world with a greater flexibility and capacity to adapt to changing relations (Elias, 1991, p. 35). It is this image of homines aperti that underlies Elias’s 1939 study on The Civilising Process, “tracing as it does changes in personality structure hand-in-hand with changes in the structure of human relations in society as parts of an overall process” (Mennell & Goudsblom, 1998, p. 35).

In his study of the civilising process Elias demonstrates how a civilising sensibility is established over time in and through relationships to others. The newborn infant emerges into a pre-existing network of relations, a network within which she or he grows and develops under the guidance of adults and continues to help form the next generation. For Elias (1991, p. 25), the “phenomenon of growing up to adulthood” is the key to understanding what ‘society’ is. As he sees it, it is only in society that the small child is turned into a more complex being:

Only in relation to other human beings does the wild, helpless creature, which comes into the world, become the psychologically developed person with the character of an individual and deserving the name of an adult human being. (…) Only in the society of other, older people does he [sic] gradually develop a specific kind of far-sightedness and instinct control (Elias, 1991, p. 21).

Within this socio-historical continuum into which each individual emerges and grows, a sociogenic shaping of the psychical functions develops and constrains us from an early age to ‘civilise’ our behaviour – it is a ‘self-compulsion’ that we cannot resist even if we wanted to (Elias, 2000, p. 367). This self-restraint becomes ‘second nature’ as we learn to moderate our spontaneous impulses and emotions in order to protect our social existence and social advantage:

The web of action grows so complex and extensive, the effort required to behave ‘correctly’ within it becomes so great, that beside the individual’s
This gradual process of transformation takes place across generations and within an individual’s lifetime, and depends on a particular patterning of the adult-child figuration (particularly the parent-child figuration) in relation to the historical phase and the peculiarities of the structure of society as a whole.

**Civilised self-restraint**

As described by Elias, the ‘civilising process’ is about how we conceal our passions, and act against our feelings to regulate our conduct. In tracing the historical transformation of the nobility in France from a class of knights into a class of courtiers in his 1939 study on *The Civilising Process*, Elias (2000, p. 370) sketches how, in the course of the civilising process, the chains of interdependence lengthen and in the process individuals are required to suppress their passionate impulses and urges. As he tells it, as the structure of human relationships is transformed, from warrior societies – where life is threatened continually and directly by spontaneous acts of physical violence; to court societies – where the threat of physical violence is subject to stricter controls and calculation, the ‘chains of dependence’ between individuals lengthen, and this demands of individuals a “permanent effort of foresight and steady control of conduct” (Elias, 2000, p. 380). With this civilising change of behaviour the individual is no longer constrained by the direct threat of untamed physical violence. Rather, this transformation of individual conduct and the monopolisation of physical violence now requires individuals to moderate their spontaneous emotions and connect events in terms of chains of cause and effect as the “tensions and passions that were earlier directly released in the struggle of man and man must now be worked out within the human being” (Elias, 2000, pp. 370, 375, my emphasis). Within these lengthening chains of interdependence, and the gradual shift from the everyday threat of physical

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57 Van Krieken (1998, p. 133) points out that the German word, which Elias originally used for ‘restraint’, is *Zwang*:

> which can also mean ‘compulsion’, ‘coercion’ or ‘obligation’, and, these concepts probably come closer to the reality of the relations between psychic and social life. Rather than speaking of a historical transition towards increasing self-restraint, then, it would be more useful to think in terms of the relations between social and self-compulsion, or discipline, thus capturing the positive, productive aspects of the effects of social figurations on human habitus.
violence, a social apparatus is established in which constraints between individuals are lastingly transformed into ‘self-constraints’:

> These self-constraints, a function of the perpetual hindsight and foresight instilled in the individual from childhood in accordance with integration in extensive chains of action, have partly the form of conscious self-control and partly that of automatic habit (Elias, 2000, p. 375).

These constraints between people are exerted on one another and “converted in the person on whom it is imposed into fear of one kind or another” (Elias, 2000, p. 443).58 Following Elias (2000, p. 442), my point is that the fears and anxieties that move people are always determined “by the history and the actual structure of his or her relations to other people, by the structure of society; and they change with it.” Indeed, as he states, “the child and adolescent would never learn to control their behaviour without the fears instilled by other people” (Elias, 2000, p. 442).

The self-controlled or ‘civilised’ parent

Writing on ‘The Civilising of Parents’, Elias (1998, p. 197) stresses that in order to understand historical changes in the parent-child relationship we need to have a theory of the civilising process in view. For him, “the ways in which the formation of habitus or ‘second nature’ changed over time, what he called psychogenesis, could only be understood in connection with changes in the surrounding social relations, or sociogenesis” (van Krieken, 1998, p. 60). With this in mind, he sets out a series of historical snapshots as ‘fragments of a process’ to create, as far as possible in limited space, a vivid picture of the civilising process encompassing parenting (Elias, 1998, p. 192).59 These historical snapshots highlight how “the structure of the family, that is the

58 Elias’ (2000, p. 442) account suggests that if we immerse ourselves in the historical processes in which our fears are formed and transformed we begin to see that prohibitions, like fear and anxieties, are socially created. For example, the domestication of a young child’s spontaneous impulses, such as sleeping naked and sharing a bed with their parents and siblings, eating with their hands, or wiping their nose with their fingers, was induced through their parents’ conscious and unconscious fears and anxieties about the potential threat to their own, and their children’s, social existence. The gradual introduction of ‘tools of civilisation’, such as the handkerchief, nightdress and fork, symbolised an increase in sensitivity towards everything that came into contact with the body, and “shame became attached to behaviour that had previously been free of such feelings” (Elias, 2000, p. 199).

59 Elias (2000, p. 157) uses a series of historical snapshots to highlight the general trend of change over large time spans, but he adds an important caveat: “The civilising process does not follow a straight line”, rather there are “diverse criss-cross movements, shifts and spurts in this and that direction.”
socially-given form of the relation between man, woman and child”, in this case the parent-child figuration, “changes in connection with, and corresponding to, the larger society it is part of” (Elias, 1998, p. 207). In illustration he highlights how historically children were considered part of the adult world and everyday interactions between parents and children were far more untamed and spontaneous than today. He suggests that it is through a gradual civilising change of behaviour, over generations, that the distance between parents and children gradually increased, with this accompanied by a corresponding “decline in the ritualised expressions of respect for parental authority” (van Krieken, 1998, p. 156). In essence, his account suggests that over time the chains of interdependence between parents and children lengthened as children were recognised as having, to a very high degree, their own unique character as a particular group of our society. The ‘discovery of childhood’, and the realisation that children are not little adults, but gradually become adult in the course of an individual civilising process, demands of parents a “greater reflexive self-awareness and self-restraint”; it requires them to ‘exercise foresight’ and to “regulate their immediate responses to children’s relatively ‘uncivilised’ expressions of their impulses and desires (…)” (van Krieken, 1998, p. 156, original emphasis). An important example of self-regulating restraint of spontaneous impulses as practiced by parents is their increasing rejection of physical violence as a means of disciplining their children (Elias, 1998, pp. 206-207).

This informalisation and democratisation of the parent-child relation “goes hand in hand with the heightening of the taboos against violence between parents and children” and is often misunderstood as a “loosening of individual self-discipline”, yet, as Elias (1998, pp. 206, 207, 208) has made clear, the inhibition of emotions that in earlier times were more violently expressed “demands – perhaps even forces – a higher degree of self control on both sides.” My point here is that the informalisation of the parent/child relation places increased demands on the mechanisms of self-restraint, as in the absence of formal rules a greater degree of restraint of one’s urges and behaviour is required. By extrapolation, what we might perceive, “as an increase in individual freedom”, for example in the (apparently) informal, private space of family dispute resolution, “is actually a greater demand for self-compulsion and self-management”

60 Elias (1998, pp. 189-190) points out that though the ‘discovery of childhood’ was identified by historian of childhood Philippe Ariès as lying between the fourteenth and sixteenth centuries: “When one looks at it more closely, it is easy to see that it concerns a long process – a process which is continuing. We are ourselves standing in the middle of it.”
This is why, as van Krieken (1998, p. 157) observes, Elias spoke of ‘the civilising of parents’, rather than ‘the civilising of children’, because the civilising of parents involves not only a particular self-awareness and foresight of the potential risks posed to the development of the child into adulthood, but also demands of parents’ self-restraint and a high degree of emotional self-control, which “as a model and a means of education then rebounds to impose a high degree of self-restraint on children.”

In such ways, Elias adds to the theoretical perspectives so far considered in this thesis and provides an important theoretical avenue for understanding the way in which the interaction between participants in a particular social setting – in this instance mediation – produces relatively orderly and predictable outcomes despite unruly emotions. Notably his insights allow us to see how the very process of mediation itself produces particular outcomes. To explain how this works in practice I turn in the first instance to the formalities of family law, and then to the mediation process within family dispute resolution itself.

The contemporary context: Negotiating the harmonious divorce

Formalities of Australian Family Law

As I have already established in earlier chapters, children’s interests are the primary concern of family divorce law and tied to this is the need to reduce parental conflict and encourage parents to remain ‘responsible’ into the future, for the sake of their children. Under s 55A of the Family Law Act 1975 (Cth) (FLA) a divorce order does not take effect until the court is satisfied that proper arrangements have been made for any children of the marriage. As illustrated in my imagined representation of mediation in Chapter One, if both parents are in dispute on any matter relating to their child (a Part VII order under the FLA) then they are required to attend family dispute resolution and, with the assistance of a mediator/family dispute resolution practitioner, negotiate and develop a parenting plan outlining their future parenting arrangements.

So far I have established that at separation parents are encouraged through the FLA to negotiate an agreement about their future co-parenting plans, rather than depend on a

61 This is where van Krieken (1998) suggests that Elias's ideas link up with those of Foucault on 'governmentality' in liberal democracies, which I will return to later in this chapter.
judicial determination, and in the process avoid present and future conflict for the sake of their child. Under s 63B of the FLA parents are encouraged:

- to agree about matters concerning the child; and
- to take responsibility for their parenting arrangements and for resolving parental conflict; and
- to use the legal system as a last resort rather than a first resort, and
- to minimise the possibility of present and future conflict by using or reaching an agreement; and
- in reaching their agreement, to regard the best interests of the child as the paramount consideration.

The critical phase in this respect, as stated in s 63B(e) of the FLA, is that any decisions divorcing parents’ reach regarding the care, welfare and development of their child must be made with reference to the ‘best interests’ of the child. This focus is reinforced at s 60CA, which requires the court to regard the best interests of the child as ‘the paramount consideration’ in making a parenting order. The best interests checklist at s 60CC sets the frame within which these decisions can be made and includes two ‘primary considerations’ and a further long list of ‘additional considerations’. The primary considerations as designated in section 60CC(2) centre on the child having an ongoing relationship with both parents and being protected from any kind of physical or psychological harm:

- 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 checklist then continues with a long list of additional considerations as set out at s 60CC(3). These include such things as the nature of the child’s relationship with their parents, grandparents, and other relatives; the parents ability to provide for and make decisions about the child; whether the parents have fulfilled their obligations to the child in the past; the effect on the child from living separately from either of their parents or other relatives; characteristics of the child such as their maturity, sex, lifestyle and background, including their culture and traditions; and, whether there are any concerns about family violence. In addition to these considerations the concept of ‘parental responsibility’ (s 61B), and the presumption of ‘equal shared parental responsibility’ (s 61DA), within the FLA further embeds the notion that in any decision-making process the focus must remain fairly and squarely on the child’s wellbeing.
As indicated, in dealing with these highly personal and previously private parenting issues, there is the potential for emotions to arise, particularly in the midst of the stresses, tensions and conflict of divorce. Yet, the very fact that the majority (around 95%) of people who commence proceedings in the Family Court reach agreement without the need for a trial suggests that most mothers and fathers tend to moderate their emotions and potentially “dangerous surges of impulse” (Hunt, 2012, p. 142).

**On the regulation of emotion**

At core family dispute resolution uses the voice of ‘reason’ to moderate ‘emotion’. This practice speaks to the well-established tradition in which emotion is juxtaposed to reason, quite often in a pejorative sense. Thus, *The Oxford English Dictionary* (2005) defines emotion as, “A strong feeling, such as joy or anger. Instinctive feeling as distinguished from reasoning or knowledge.” Similarly, *The New Fontana Dictionary of Modern Thought* depicts emotion as:

A word used in ordinary language to refer principally to subjective experience. The Platonic tradition regarded emotion as the enemy of reason, and hence of judgement, truth and morality (Bullock & Trombley, 2000, p. 266).

Rustin (2009, p. 19) comments that historically the social sciences were associated with a commitment to reason and rationality, and as a consequence of this distinction “most of the social sciences found it difficult to incorporate the emotions into their disciplinary schemas.”62 However, Rustin (2009, p. 22) suggests that from the 1950s in Britain and America there developed a detailed exploration of emotions within the social sciences which have shown that “emotions are fundamental in the formation of the mind, as part of our innate motivational system”, and as such, “reason is not a faculty separate from, or higher than, emotion, but is the reflective capacity human beings have to regulate and elaborate their emotions in the light of their purposes.” Now we find emotions are being ‘brought back in’ to the social sciences as a legitimate topic of study (Rustin, 2009), and are even considered essential for sociology because,

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62 The English translation of Volume One of *The Civilising Process* by Norbert Elias was not published until 1978.
as Barbalet (2002, p. 2) points out, “no action can occur in a society without emotional involvement.”

Sociological insights emphasise the weight carried by the notion of emotion in a behavioural sense, with Barbalet (2002, p. 1) suggesting it is a word often used as a “term of pejorative evaluation.” As indicated above, this negative evaluation is important in understanding why separating couples in the formalised arena of family dispute resolution, when their behaviour is under scrutiny, may work hard to suppress their emotions, and present as rational mothers and fathers behaving in an orderly fashion. With reason traditionally coded ‘male’, and emotion ‘female’, this signals the potential of family dispute resolution, with its emphasis on rationality, to differentially impact on how women and men manage their behaviours during the mediation process, and do or do not feel that their voice and concerns have been heard. In this regard the essential issue is that emotion is the “very dynamism of social interaction and social relationships” (Barbalet, 2002, p. 4). Hence in family dispute resolution, it is the triangular interaction between the mother, the father and the mediator that is of crucial importance, with each infused with a network of norms about rational behaviour, good parenting, and the needs to keep emotions in check in the best interests of all concerned, most particularly the child. Before turning to the way in which the structured process of family dispute resolution works to foreground rationality at the expense of emotions to create and maintain a ‘favourable climate’ for mediation, I summarise the main historical developments associated with the evolution of family dispute resolution in Australia.

**Family dispute resolution in Australian Family Law**

Mediation in its modern form can be traced to the United States, where alternative forms of dispute resolution were used to deal with issues arising in the areas of labour management, neighbourhood disputes, and by the late 1960s and early 1970s, post-separation parenting. This was a period in United States’ legal history characterised as a 'litigation explosion' (Birke & Teitz, 2002, p. 185) due to an increased demand for civil rights, and a growing awareness of environmental and peacekeeping concerns, which created a backlog of cases within the law courts. Prior use of mediation in work-related,

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63 Once contemporary sociologists turned their attention to the sociology of emotions, they could find important precedents for their work in several sociological classics, for example, Weber, Durkheim and Simmel (Rustin, 2009).
neighbourhood and domestic disputes made the process well placed to help with this backlog. By the 1970s it had emerged as the preferred option of family court judges in the United States, not only because it relieved the demand on the courts, but more importantly because advocates of mediation argued that voluntary agreements about post-dissolution parenting issues, "were more likely to be in the best interests of the child than were judicially-created resolutions" (Birke & Teitz, 2002, p. 183). Eventually this led to mediation being mandated in appropriate cases, and in the process moving from the periphery of law to being a central part of family law.

In Australia, influenced by the development of community based mediation services in the United States, and looking for a better way of dealing with the kind of community conflicts referred to as 'backyard disputes', the New South Wales government implemented a pilot project to deal with such conflict in 1979 (Astor & Chinkin, 2002). Localised neighbourhood disputes had required time, attention and resources from the police and the courts, and the creation of Community Justice Centres (CJCs) was considered to be one way of lowering the costs of law enforcement and crime prevention by managing the issues locally before they escalated into open conflict. While the CJCs dealt mainly with community disputes there was also a steady increase in the number of family disputes, which were seen by those working in the area of family breakdown to be ideally suited to mediation rather than litigation. In Young and others (2013, p. 51) view:

> It has long been recognised that the problem with going to court, particularly in family matters, is that in common law based jurisdiction, the courts proceed by the adversarial system. The negative effects on children exposed to or used as pawns in their parents’ disputes are well known and well documented. Research has clearly indicated that the adversarial system escalates conflicts and impacts adversely on children.

In parallel, Astor and Chinkin (2002, pp. 6, 18) point out that the adversarial system was considered "particularly detrimental to the project of protecting children" from disputes "fought with great bitterness", whereas the "confidential, consensual style of mediation with its emphasis on preserving future relationships was seen as being appropriate for disputes originating in the private world of the family."

Since then, the move to mediated agreements rather than litigation has progressed steadily at a national level in Australian family law and is now the preferred option in divorce disputes. Provision for it is contained in the *Family Law Act 1975* (Cth) at s 13C(1)(b) where the court can refer parties to attend family dispute resolution at any
stage in divorce proceedings, and, as already established, compulsorily so in matters relating to any children involved in divorce (s 55A). Subsequent to that, as previously discussed, the Family Law Reform Act 1995 (Cth) acknowledged the centrality of mediation in family law disputes by inserting new sections into the FLA, and replacing the term ‘alternative dispute resolution’ with ‘primary dispute resolution’ to convey the message that family mediation should no longer be considered an alternative to court proceedings, rather it was the primary means of dealing with family law issues. It also introduced the concept of the ‘best interests of the child’, rather than the ‘welfare of the child’ denoting that children have the right to know, be cared for by, and have regular contact with both parents. Parenting plans were also introduced as part of the mediated focus of the family law system.

With the passing of the Family Law Amendment (Shared Parental Responsibility) Act 2006 (Cth), the emphasis was further placed on non-litigious mechanisms for resolving divorce disputes with the introduction of a number of new parts into the Act which related to family dispute resolution. As previously outlined, these include a distinction between, on the one hand, non-court based family services, such as community based Family Relationship Centres which provide family counselling and dispute resolution services (Part II), and, on the other, court-based ‘family consultants’ (Part III) who work within the court system to “assist the court in determining the best outcomes for children” (Young et al., 2013, p. 79). The purpose of this was to create a two-pronged approach to help steer separating families away from the adversarial system.

As well as family dispute resolution, the non-court based Family Relationship Centres (FRCs) provide a range of resources and support services in the community for separated families. With this, their focus is intended to be “squarely on keeping parents out of court by providing a dispute resolution service which will encourage parents to sit down together, focus on their children and agree on parenting arrangements” (FRCs, 2005, as cited in Young et al., 2013, p. 53). The 2006 amendments further emphasised a non-adversarial focus at divorce by imposing an obligation on legal practitioners, officers of the court, family counsellors and family dispute resolution practitioners to inform parties of the non-judicial services available to them, and the legal and possible social effects of the proposed proceedings (including the consequences for children whose care, welfare or development is likely to be affected by the proceedings) (s12B).

If matters cannot be resolved through community based family counselling and dispute resolution services then court-based family consultants work within the court system
to ensure "that matters that come to court are resolved without a judicial
determination where possible, and where that is not possible that the interests of
children are protected" (Young et al., 2013, p. 80). Family consultants are experienced
social workers and psychologists who provide case management services within the
family court. These professionals, from the behavioural sciences, work within the
family court to facilitate the resolution of family disputes and assist the court in
determining the outcome considered to be in the child’s ‘best interests’.

In further emphasising mediated agreements rather than litigation, the *Family Law
Amendment (Shared Parental Responsibility) Act 2006* (Cth) added the requirement that
the court must now be satisfied that all persons who have a dispute about matters must
make a *genuine effort* to resolve their dispute by family dispute resolution (s 60I(1))
before they can litigate. There are some exceptions to this requirement as set out in s
60I(9), such as where there are claims of family violence or child abuse, but in most
cases “failure to attend family dispute resolution or to make a genuine effort to resolve
issues might result in severe financial penalties” (Young et al., 2013, p. 65). Under these
provisions family dispute resolution practitioners are responsible for assessing and
certifying whether the parties have indeed made a ‘genuine effort’ to resolve their
dispute; however, there is no definition of what constitutes genuine effort in the Act to
guide them. Commenting on this, Astor (2010, p. 2) argues that what constitutes
genuine effort needs to be clarified because parents “need to know what is expected of
them, so that they can prepare for and *behave appropriately* in family dispute
resolution” (my emphasis). Drawing out the implications of this, Young and others
(2013, p. 65) point out that this lack of an exact definition “accords fully with the
discretionary nature of many important family law concepts”, which they say, is
particularly pertinent to “the ‘best interests’ principle which guides all decision-making
regarding children.”

Here I refer again to Marc Galanter’s (1992) observation that law increasingly operates
through ‘indirect symbolic controls’, that is, by ‘radiating messages’ rather than
imposing physical coercion. As Gwynn Davis (2000, pp. 136-137) has observed, in the
family law field the ‘radiated message’ is that “parents should behave in a reasonable
and conciliatory fashion, co-operating with one another and putting their children’s
interests before their own.” Significantly for my interests in the combination between
the formal and the informal as represented in the law and cognate behavioural
services, the mandatory requirement to attend family dispute resolution and make a
‘genuine effort’ to resolve disputes involving children, sets up family dispute resolution
as “a gateway through which all who wish to go to court must pass” (Astor, 2010, p. 63). The mandatory nature of family dispute resolution also creates a clear framework for how matters involving children at divorce are to be managed, and forms an integral part of the strategy to deflect divorcing parents away from the court. Further, family dispute resolution practitioners, in their capacity to assess and certify whether a genuine effort has been made, have become the gatekeepers to family courts. This accords family dispute resolution and family dispute resolution practitioners a significant role in managing the stress and emotion of divorce, with this underlined by the fact that most people who commence proceedings in the family court reach agreement without the need for a trial.

As already established, while family dispute resolution has a significant role in negotiating outcomes in family law its precise mechanisms remain elusive. What we do know is that there is a basic structure to family dispute resolution, and at its centre is the family dispute resolution practitioner who conducts and manages the process. Family dispute resolution is defined in the FLA at s 10F as a process:

- in which a family dispute practitioner helps people affected, or likely to be affected, by separation or divorce to resolve some or all of their disputes with each other; and
- in which the practitioner is independent of all the parties involved in the process.

Section 10G of the FLA defines a family dispute practitioner in circular terms, as someone who is accredited and authorised to act as a family dispute resolution practitioner.64 Other than that there is little else in the FLA to regulate the process of family dispute resolution (Young et al., 2013). With this in mind, I turn to the basic structure of the mediation process, and with this, the techniques and strategies mediators utilise to narrow the agenda and isolate issues and thus to manage the intense emotions potentially associated with the conflict of divorce.

64 The Family Law (Family Dispute Resolution Practitioners) Regulations passed in 2008 set out the criteria for accreditation for family dispute resolution practitioners and created obligations in relation to their conduct while working as a family dispute resolution practitioner (Young et al., 2013).
The process of family dispute resolution

As established at the outset of this chapter, divorce can be a time of unruly emotion with partners adjusting to what may be a fundamentally different future. The ‘good’ divorce is “constructed within the discourses of harmony and welfare, and has become the ideal to strive for” (Day Sclater, 1999a, p. 177). It is characterised by “rational appraisal and behaviour”, it is forward looking, it keeps families together – in the shape of the restructured ‘post-divorce’ family with an emphasis on shared parenting – and “it is associated with mediation” (Day Sclater, 1999a, p. 177). This accords with Neale and Smart’s (1999, p. 38) observation, that this model of post-divorce family life and gender-neutral shared parenting has been driven by the welfare discourse and the assumption that children are damaged by divorce, and that “this damage can be mitigated if particular forms of parenting and therapeutic interventions are put in place.” In line with this ethos, the ‘helping’ professions stress the importance of resolving emotional issues to ensure the success of the ‘post-divorce family’, and encourage parties to utilise mediation processes to reach agreement and avoid conflict.65 Accordingly trained mediators draw on techniques and strategies in mediation to manage behaviours and provide separating adults with particular attributes to develop their capacity for self-control.

These techniques and strategies are set out in a number of professional texts, including Boule (2011) Mediation: Principles, Process, Practice, Boulle and Alexander (2012) Mediation: Skills and Techniques, Fisher and Brandon (2012) Mediating with Families, and Charlton and Dewdney (2004) The Mediator’s Handbook: Skills and Strategies for Practitioners. These texts document the various stages of mediation, which, the authors acknowledge, may not always unfold in a neat linear sequence but are common to most mediation processes. As commonly identified in these texts, the key stages are set out as:

- Mediator’s opening statement
- Party initial statements
- Definition of the problem
- Discussion and exploration of the issues
- Generation of options, negotiation and problem-solving
- Final decision-making, recording and closure

65 FLA s 55A and s 63B
Within this basic structure of mediation, mediators are encouraged to deploy a range of strategies and techniques in order to give parents a sense of ‘freedom’ to negotiate their own agreement.

The key stages of the mediation process establish “how things happen in the room” (Fisher & Brandon, 2012, p. 57), and are designed to be rational, orderly and adaptable. As set out in the professional texts, there are certain expectations as to how mediators manage and maintain the orderly sequence of the mediation process, and each stage of the process is significant for navigating the parties through the decision-making process and making the necessary adjustments to keep the process on track. For example, during the preliminary stage of ‘meeting, greeting and seating’ the mediator is encouraged to help the parties to ‘settle in to the process’ by engaging in pleasantries and small talk (Boulle & Alexander, 2012, p. 113) while, at the same time, assessing any factors that may influence the process, such as gender, age, cultural background, interpersonal skills, and comfort levels (Boulle, 2011, p. 236), and then making any necessary adjustments to enable active participation by all parties. This preliminary stage is followed by the mediator’s opening statement, where he or she briefly endorses their authority by reaffirming their professional credentials and referencing past success rates (which also helps to ‘normalise’ the process). The mediator educates the parties in the orderly sequence of the mediation process by setting out the framework and guidelines for the interactions between the parties and the mediator; indicating the expectations and limitations on acceptable conduct; establishing the parties’ authority to settle (reminding them that they are in control of the outcome); and, where children are concerned, highlighting the need for parents to focus on the ‘best interests’ of their children (Boulle, 2011, p. 236; Boulle & Alexander, 2012, pp. 114-115; Charlton & Dewdney, 2004, pp. 11-12; Fisher & Brandon, 2012, p. 59).

In highlighting the need for parents to focus on the ‘best interests’ of their child the mediator reminds them that the ‘harmonious divorce’ prioritises a particular interpretation of children’s interests, that is, continuing contact with both parents and freedom from exposure to parental conflict, and that this focus is backed up by legislation. Boulle (2011, p. 186) makes the point that, in mediation:

(...) parties operate with some understanding of their legal rights and obligations, with an expectation of how the dispute would be resolved through the legal process, and with some knowledge of the time, costs and risks associated with litigated outcomes.
The mediator may also emphasise the legal implications by reminding parents that if they fail to make a decision then the decision will be made for them in the family court – and in that setting there will be little room for manoeuvre. I will return to the implications of the role of formal law in the (apparently) informal setting of family dispute resolution later in this chapter.

As the mediation progresses through the various key stages mediators are encouraged to “generally assist the parties to understand each other’s perceptions” (Fisher & Brandon, 2012, p. 60) through a range of strategies and techniques such as isolating relevant issues, narrowing the agenda, and encouraging parties to question and adjust their own perceptions to help them to “see things in a different light” (Boulle & Alexander, 2012, p. 177). This involves such mediator practices as ‘reframing’ inappropriate language used in the heat of conflict into words and phrases that are “positive instead of negative, constructive instead of destructive, and problem-solving rather than problem-reinforcing”; ‘paraphrasing’ dialogue between parties “by picking up on important issues and reflecting the salient points in the mediator’s own words”; and, continually assessing and ‘summarising’ the issues the mediator considers useful for mediation to provide a “positive and encouraging basis for parties to move forward with negotiations” (Boulle & Alexander, 2012, pp. 169, 189, 190). As seen by Charlton and Dewdney (2004, pp. 199-200), reframing is one of the most important and productive skills in mediation as it can remove the ‘toxic’ content of a statement to make it more palatable and in the process set the scene for a more constructive and co-operative approach.

As Fisher and Brandon (2012, p. 83) assert, unruly emotions associated with divorce can cloud parents’ interaction in mediation, making it difficult for them “to be rational in resolving their issues.” They argue that it is the mediator’s role “to navigate the turbulence” and to “help the parties deal with their emotional differences” by drawing on a series of useful strategies (Fisher & Brandon, 2012, p. 83). As Boulle and Alexander (2012, pp. 59-60) suggest, mediators can discourage or ignore the expression of intense emotion; acknowledge the emotion, then continue; encourage some expression of the emotion to the other; or, identify and deal with underlying problems therapeutically. If the intense emotional situation continues, and “appears to be getting in the way of one or more of the parties’ ability to think clearly, move forward or make decisions, a mediator might intervene to create some safe space in mediation” (Boulle & Alexander; 2012, p. 61). They suggest that this may involve taking a break, or having separate meetings with the parties, which can “provide relief from destructive
emotions and high tension and allow the relevant party to vent their feelings in the absence of the other” (Boulle & Alexander, 2012, p. 143).

Reflections

Such claims illustrate how the practices of mediation “help to shape the stories that are told” (Day Sclater, 1999a, p. 179), and can be seen as a way, “of imposing prescriptions for behaviours which foreground our rationality at the expense of our emotions” (pp. 182-183). Adding to the insights of Elias, a critical reflection on these practices helps to reveal how the powerful rhetoric of the harmonious divorce constructs children as vulnerable subjects, and responsible/civilised parents as those who avoid conflict and maintain a harmonious post-divorce relationship in the best interests of the child. As argued from the outset, this discourse may involve parents in subordinating their own needs and desires, while also obscuring the differences between mothers and fathers in this respect. Further, within the longer-term processes of civilising parents, the democratisation and informalisation of the parent/child figuration demands of parents a high degree of foresight, self-restraint and ultimately ‘responsibility’ for protecting their child’s development into adulthood.66

Day Sclater (1999b, p. 178) observes that once in mediation the “idealisation of the harmonious divorce” can be difficult to sustain as “confronted with the realities of their hostile emotions”, parents often find “they cannot always be amicable.” Whereas discourses of harmony seem to promise that our ‘emotions are manageable’; in so doing, “they effectively deny that ordinary human nature has its darker side” (Day Sclater, 1999b, p. 179). For Day Sclater (1999b, p. 180), the restraints imposed on our recognising the emotional complexities of divorce lead us to either ‘trivialise’ it, “as in the booklets distributed to divorcing parents which tell them that they must ‘put their feelings to one side for the children’s sake’”, or to ‘pathologise’ it, “as when ‘conflict’ is regarded as dangerous, abnormal and avoidable.” In both cases, she argues, “the dominance of the welfare discourse can be seen as an attempt to manage the emotions and thereby deny the realities of family breakdown” (Day Sclater, 1999b, p. 180). I emphasise that Day Sclater is not suggesting that we should not be caring for our children, but that caring for them has become a ‘compulsory norm’ ruling out mother’s

66 On this, I note van Krieken (2005, p. 45) poses the question as to whether it is really true “that disputes between parents can only be managed in law by displacing them by one degree behind the best interests of the child.”
and father’s expression of their own emotions. As Piper (1996, p. 179) observes “the focus on the child not only entails the promotion of a variety of norms about what constitutes their best interest but also constitutes a norm itself”, as to be a ‘good’ parent you must relegate your own interests ‘to second place’ and not oppose the arrangements “which put these norms into practice.”

Within this legal/welfare complex there is little discussion of the different difficulties mothers and fathers face in the wake of divorce. As Day Sclater and Piper (1999b) observe, against the ‘gender neutrality’ of family laws notion of ‘parental responsibility’, parenthood remains highly gendered in practice. The reality is that “it remains the case that men and women do different things as fathers and mothers, both before and after divorce” (Day Sclater & Piper, 1999b, p. 19). The focus on shared parenting, implicit in the concept of parental responsibility, conflates ‘mothering’ and ‘fathering’ in a gender-neutral concept of ‘parent’ where “fatherhood becomes synonymous with motherhood, and fathers are encouraged to ‘share’ caring activities with mothers” denying the fundamental facts of gender difference (Day Sclater & Yates, 1999, p. 288). Significantly, and as previously highlighted, this model of family life is underpinned by arguments about the rights of fathers to jointly care for their children as they are ‘just as capable as mothers’, and supported by the welfare discourse whereby children are “said to need two biological parents and the restabilising influence of the non-residential father” (Neale & Smart, 1999, p. 37).

In conclusion I return briefly to Elias’s arguments on the civilising process. Here van Krieken (1998, p. 131) points out that his analysis is “by no means a settled affair, and that there is considerable room for its further development and refinement.” In his critical reflections he takes issue with Elias’s stress on the “unplanned character of social change” and his neglect of “particular groups of lawyers, inquisitors, clergy, judges, entrepreneurs and so on”, who most social historians paint a picture of having “played an active, constitutive role” in shaping European history “rather than merely

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67 In my imagined representation of family dispute resolution, parents Kate and Harry negotiate over shared care arrangements for their daughter Iris. Though Kate has always been a fulltime mother to Iris while Harry worked fulltime, Harry is now requesting an equal shared parenting arrangement.

68 Van Krieken (1998, p. 2) sets out a detailed analysis of Elias’s “unique approach to sociology” in Norbert Elias. He states that Elias “was one of the first truly ‘public intellectuals’ who, in being both admired and criticised, makes a real contribution to the enrichment of human social life” (van Krieken, 1998, p. 41).
reflecting their social context” (van Krieken, 1998, p. 127). Here van Krieken (1990, p. 362) makes the important point that for many European workers and peasants “change did indeed come upon them from the outside, and in the shape of lawyers, judges, police officers, inquisitors, teachers, employers, and so on (...)” (original emphasis). As an example, he cites the transformation of the legal system in the twelfth and thirteenth centuries, from one designed to respond to, and resolve community conflicts, to one in which the central authorities – town, state and church – took a much more active role in everyday life. As he says, “clearly the disciplining of the population was planned by someone at various points in European history” (van Krieken, 1990, p. 363). If we consider the way in which family law legislation,70 and in particular the ‘best interests’ principle,71 currently guides all decision-making regarding children at divorce, and how it is intimately linked to the management of behaviour and decisions of the responsible/civilised parent, then, as van Krieken (2005, p. 46) suggests:

It is important to recognise that what is happening around the concept of the ‘best interests of the child’ as firmly rooted in a longer-term process of ‘civilising parents’, and the role of the legal system as a ‘civilising offensive’, the institutional ‘crystallisation’ of that broader social process.

Van Krieken (2005, p. 47) maintains that the analysis of these developments is as much about the ‘governance’ of family life as it is about the ‘civilisation’ of family life. Whereas Elias’s insights illuminate how it is that parents, through long force of habit, come to regulate themselves in mediation, van Krieken (1990, p. 361) points out:

The possibility that people may simply fail to respond to the ‘constraint towards self-constraint’, and that this constraint might then be consciously and deliberately given more directly coercive and institutional forms, or, perhaps more importantly, that it might not, is not suggested by Elias’s formulations even though that appears to be precisely a central characteristic of the histories of education, poor relief, criminal justice, religion and work (original emphasis).

For van Krieken (1990, p. 362; 1998, p. 127), the crucial point is whether we should be speaking of ‘civilising processes’ or ‘civilising offensives’. Drawing out the implications of this, I reemphasise the intimate relationship between power and liberty operating

69 As van Krieken (1998, pp. 126-127) points out, although “Elias did explicitly argue that we should analyse the interweaving of intentional action with unplanned social processes, in the substance of his analyses he laid far greater stress on the unplanned character of social change.”

70 FLA s55A

71 FLA s60CA
within the mediation process whereby the parties to mediation have the ‘freedom’ to negotiate their own agreement, yet at the same time, the process takes place under the umbrella of the potentially coercive law. As previously argued in relation to Foucault, the regulations of family law together with their institutional setting (in this case the ‘governable space’ of family dispute resolution) simultaneously constrain and enable the responses of divorcing parents through a complex symbiotic relationship between law and disciplinary power. This relation of ‘reciprocal constitution’ (Golder & Fitzpatrick, 2009), between law and disciplinary power, enables law to extend its influence and legitimacy into more personal and private areas of life – such as the ‘private’ family – by embracing the objects of the ‘psy’ professions, in this case, the welfare, or ‘best interests’, of the child (Smart, 1995).

Finally, I stress that law plays a distinctive role in partnership with the broad social and behavioural means by which divorcing parents are regulated in family dispute resolution. The power operating in the mediation process is not as overt as that operating within the family court, with its formal characteristics of ritual, costume, language and legal process. Rather, it is an ‘unremarkable’ power exercising a covert form of control over the management and administration of life, a control that aims to shape and normalise the self-regulating capacities of the divorcing subjects. As illustrated here, it is difficult to identify because it hides its sources of power, or, as previously argued in relation to Foucault (1998), its own mechanisms.

These issues canvassed in this and previous chapters – the operations of law under a system of ‘liberal’ governance; the alliance between law, experts and the institutions of the state; the myth of gender neutrality; the shift to personal responsibility under advanced liberalism; the pervasive notion of the best interests of the child; and the entirely ‘reasonable’ notion of mediation – all help to explain the outcome of my imagined representation of mediation in family dispute resolution, and how/why Kate came to feel as she did. In the next and concluding chapter of the thesis, I pick up the central threads of my discussion and examine them more closely.
Chapter Six

Silenced by Reason: Further Reflections

I’ve begun to realise that you can listen to silence and learn from it.
It has a quality and a dimension all of its own (Chaim Potok, The Chosen).

The heart has its reasons which reason knows not (Blaise Pascal).

In the introduction to this thesis I set out to understand how the intensity of feeling and disagreement at family breakdown is managed at divorce for parents with dependent children. In the course of my initial research I became increasingly convinced that it required something more than law itself to manage the highly charged emotions surrounding divorce. Throughout this thesis I have explored this proposition, and argued that family law simultaneously constrains and enables the responses of separating couples, and in doing so relies on expertise developed in sites other than family law itself. In managing the potential for spontaneous emotions at divorce, family law, in a ‘relation of reciprocity’ with expert knowledge, invokes certain research findings while disqualifying others, while relying on the capacity of the ‘responsible’ parent to actively cooperate in their own self-governance and make their own decisions for the sake of their children. Significantly though, the conditions under which these decisions are made are well regulated and tied to appropriate conduct or self-control, and limited by the hidden mechanisms of law which remain as a ‘pure limit set on freedom’, enforceable if and when parents desist in actively cooperating in their own self-governance.

In the process of unravelling this complex picture I created an imagined representation of mediation within family dispute resolution as a point of reference. This scenario, together with a range of theoretical insights, enabled me to gain further insights into how negotiations between antagonised divorcing parents are steered in particular directions in mediation, while other issues, deemed to be officially irrelevant to the desired outcome, are potentially sidelined, or silenced. It is the nature of this silencing
that intrigues me, and on which I further reflect in this concluding chapter. I am interested in what is being silenced in mediation, and in particular, the potential for mothers to be silenced by reason.

At the end of Chapter One we left Kate, the mother in my imagined representation of mediation, feeling unsettled, frustrated and angry with herself after mediation for not speaking louder than the background noise of law and the experts who were telling her what was best for her child, a child unknown to them. Kate was confounded as to why she had felt selfish and unreasonable when she had tried to speak out for her daughter Iris, and confused as to why she had been unable to clearly say the things that, in her view, mattered most. She was unsettled and angry because she had a strong sense of having been complicit in her own silencing. This is what she was thinking when we left her:

How was it that Iris kind of disappeared from the room? She wasn’t there. We could have been talking about any child at the same age. Almost like she was an object, a focus, to be discussed rationally and dealt with as part of an official agenda. (...) It’s like I was being a good mother, a reasonable sort of person, by talking about it all so rationally. (...) It’s odd, because Martin was reasonable enough; it wasn’t as though he just took Harry’s side. All the same though, he behaved like he could tell me what was best for Iris when he hasn’t even met her. And he never acknowledged that I was the one that looked after Iris when it suited Harry to move out. And he kept talking about us as parents. (...) The thing is, I think I’ve gone and let my little girl down; I’ve been so anxious to be responsible and good that I’ve been afraid to buck the system and say what I really feel, what I really think.

Of significance here is Kate’s sense that she has actively cooperated in silencing herself. In my representation I was trying to portray how Kate knew her daughter intimately but felt she had not been able to explain the intimacies of what she knows as her mother without sounding unreasonable. She was unable to speak directly as Iris’s mother, she could only speak more broadly as ‘a parent’, a far less intimate position; a position loaded with a particular type of rationality framed in terms of ‘parental responsibility’ and supported by welfare and legal expert knowledge. The emotional connection that Kate has with Iris was sidelined from the content of mediation by the mediator, and the role of the ‘responsible parent’ was embedded – a far more rational connection for the purpose of resolving conflict and reaching agreement on parenting arrangements. I was also trying to illustrate that Kate has submitted to something she cannot quite name – limiting, guiding and constraining her role in the mediation process, but difficult for her to identify.
On reflecting on how Kate was silenced, and how/why she cooperated in this silencing, I will draw together the threads of my thesis and elaborate on the theoretical insights gained to further examine the notion of being silenced by reason. As well as summarising the key of the thesis, I will return to Kate and, on a couple of occasions, for the purpose of illustration and illumination of particular points, cite examples from two novels: *The Golden Age* by Joan London (2014), and *The Children Act* by Ian McEwan (2014). As indicated in the Introduction, Kate's story is an imaginative re-creation based in part on factual data (mediation manuals, the forms of parenting agreement currently in force) and in part on my own intuitive sense of what, in subjective/emotional terms, is at issue under the cover of the 'civilised' process of mediation. I created this account partly on the basis of my own experiences but introduced significant differences (in my case the child was a son, and there was no equivalent of a 'Harry') with these designed to prompt me to think more broadly about the nature of the process and the issues that might have been involved.

In returning to Kate in this chapter, and in occasionally drawing on other examples from fiction to illustrate my theoretical points, I am following psychologist and psychotherapist Andrew Relph (2012a), who, in his recent biography *Not Drowning, Reading*, acknowledges how it has been through reading certain novels that he has been better able to understand himself, his personal feelings, and the choices he has made throughout his life. It is also through reading that he has been able to reflect on his life and have a better understanding of the way in which relations formed across generations, and within his own lifetime, impact on his day-to-day life. This invokes Elias's insight into how we need to see individuals within their social and historical context, within a network of social relations, or figurations; that is, to understand the orderliness of social life we need to understand the historical phase individuals were born into, and the peculiarities of the structure of society as a whole within which they emerged and grew up to adulthood. Relph (2012b, p. 2) makes the point that "we carry in us all our previous selves and all our previous relationships: the child, the teenager, the young lover, the ambitious adult, the muddled middle-aged and also the people who were intimately with us at each of those times", and suggests that through reading fiction we can catch up to where we are "at any point in one's life." In brief, his perspective on reading as a way of understanding ourselves highlights how, as Ralph Waldo Emerson observes, “fiction reveals truth that reality obscures”, and sets up a way of illustrating and illuminating the points I wish to examine further in this chapter.
With these points in mind, I elaborate on the ‘pressure points’ that come to bear on the silencing of Kate, variously considering the way in which knowledge and power can potentially silence and subordinate truth; the willing alliance established between experts and the family claiming the power of truth; how we come to conceal our passions through a civilising process of self-restraint; the limitations of reason and the ‘power of law; and, how the ‘best interests’ of the child principle operates as a mechanism of social control. As part of this discussion, I also retrace the key theoretical and historical strands of my thesis, for my attempt to understand the nature of current developments has always been grounded in the supposition that a long distance view, both theoretically and historically, is important.

On silence

It is silence that most needs an answering –
when I can no longer speak, hear me


The act of silence occurs on a continuum – at one end there can be a sense of individual power in choosing to be silent, it can be a dignified choice such as choosing not to get involved in a discussion or argument; at the other end there is the impotence of being silenced, whether by extreme force, or by factors related to our race, gender, sexuality, age, or ethnicity, which may place limitations on who can speak and what can be said. This form of silencing can be difficult to identify and often difficult to resist. It is this latter, less overt, form of being silenced that I wish to reflect on here as it relates to the limitations on what Kate was able to say as Iris’s mother in mediation.

We have all experienced silence in some capacity, whether it is a matter of choice to remain silent in any given situation, a sense of not having been heard when you do speak, or limitations (visible, or hidden and difficult to identify) on when you are able to speak and what you are able to say. For Foucault, the limitations placed on what can and cannot be said, and who can and cannot speak, is tied to the way in which knowledge and power can silence and subordinate truth. As set out in this thesis, Foucault (1977, p. 194) conceives of the modern exercise of power as something other than repressive and interdictory; rather, for Foucault, modern power is ‘productive’: “it produces domains of objects and rituals of truth.” It is a disciplinary power exercised over the calculated management of everyday life, and works to affect the way in which
individuals (singly or collectively) "conduct themselves" (Foucault, 1988, as cited in Burchell, 1996, p. 20, original emphasis). As outlined in Chapter Three, this calculative form of governance relies on expert knowledge to provide individuals with “particular skills and attributes to develop their capacity for self-control” (Hindess, 1996, p. 113). There develops what Rose and Miller (1992) refer to as ‘relations of reciprocity’ between the social sciences and government, whereby experts ally themselves with political authorities and their problems, while also allying themselves with individuals by translating their worries, decisions and aspirations into a language claiming the power of truth. On this view, the authority of official expert knowledges act as instruments of normalisation, working to shape and normalise the self-regulating capacities of subjects so that their personal choices will be aligned with the ends of government.

An example of ‘normalisation’ operating at family breakdown is the ‘rhetoric of welfare’ and the discourse of the ‘good’ divorce which pervades the divorce process and is informed by specialist expert knowledge on what is considered to be best for children at divorce; that is the need for contact with both parents and the absence of parental conflict (Day Sclater & Piper, 2001). These ‘norms’ are not only present in the mind of the mediator in my imagined representation of mediation, but are also played out in the aspirations and subjectivities of the parents. The reason Kate and Harry were in mediation was to work out a suitable plan to enable their daughter to have ongoing contact with both parents, and, though they initially disagreed on the terms, they stayed in the room until they reached agreement on a reasonable plan in the hope that they could avoid conflict for the sake of their child. This ‘compulsory norm’, of focusing on what is considered best for the child at divorce, potentially silences the rational/responsible parents’ expression of emotion by imposing “prescriptions for behaviour which foreground our rationality at the expense of our emotions” (Day Sclater, 1999a, p. 183). Importantly, these ‘norms’ are also supported in the details of legislation, a significant factor I will return to later in my discussion.

A clear illustration of this form of silencing by the productive nature of disciplinary power occurs in Joan London’s (2014) novel The Golden Age. The novel is set in a polio convalescent home in Western Australia in the 1950s, where children with polio receive ongoing physical therapy and continue their education within the home. In the novel, teenage polio patients Frank and Elsa develop a tentative physical relationship. When a nurse discovers them together, undressed and in bed, she follows ‘correct procedure’ and contacts the governor of the convalescent home who organises for the
board of governors to interview Frank and Elsa separately. In the following extract Elsa undergoes an interview with the board of governors (possibly all men) in 1950s Australia:

[Elsa] had seen, when she came in, a collection of faces so old and grim, so marked by righteousness, puckered with disapproval, that their jaws drooped, their eyes hung down.

‘Were you surprised when he lay on top of you? Were you shocked?’

Elsa shook her head and lowered her eyes, as if she’d lost the power of speech.

She did not say: *I wanted him to*. How could she tell them that? (London, 2014, pp. 190-191).

Later, when the interview ended:

Elsa took her crutches and left. She knew as she made her way back to her bed that she would never get over this. She found it hard to walk. Every muscle she had nurtured, tried to love back to work, shrank in humiliation. She felt as if clods of dirt had been thrown at her. Not by Frank, but by those people on the board. She would never forgive them (London, 2014, p. 192).

Elsa’s anger and frustration evokes Kate’s similar frustrations in the car park after mediation. Here Elsa’s ability to express herself was ‘lost in translation’ as there was no space for other interpretations; sex had to be managed and this perspective was informed by medical, psychological and welfare discourses, and promoted and reinforced by the processes and practices by which ‘correct procedure’ was followed in the convalescent home. As the theorists considered in this thesis point out, the growth of medical, psychological and welfare knowledges in the mid-twentieth century brought with them new modes of regulation and mechanisms of disciplinary power; sex and morals were intimately linked and needed to be managed and regulated, and in the process, particular forms of self expression were silenced or subordinated.

With this, the social and historical context within which Elsa grew up to adulthood, that is the social relations, or in Elias’s terms, figuration, within which she was civilised, informs her habitus, or ‘second-nature’, and places restraints on her behaviour. The historical phase of 1950s Australia, together with the peculiarities of the structure of society as a whole at this time, made it impossible for her to express the emotions she felt for Frank – she had to conceal her passions to protect her social status and identity. Importantly, she was aware of the limitations on what could and could not be said; she
could not tell an elderly board of governors the things she knew to be true – she was constrained to conceal her passions and act against her feelings to regulate her conduct in order to demonstrate that she was civilised.

In parallel, I suggest that the extensive fields of specialist knowledge and modes of regulation relating to marriage and divorce, together with the civilising sensibility established over time in the parent/child figuration, works to silence the intimate issues of mothering, and, in turn, silenced Kate in mediation. The growth of expert knowledge on the welfare of the child at divorce has influenced not only the way in which divorce has been regulated and managed, but also, and more critically, it has changed the way we view the role of mothering with an emphasis now on ‘shared parenting’ and the gender-neutral concept of the ‘responsible parent’ – a focus which obscures the differences between mothers and fathers. The manifold ways now bearing on family dispute resolution and the ‘silencing’ of Kate in the mediation process have their foundations in the shifts in parenting discourses occurring over at least the past two centuries. As traced in Chapter Four, Donzelot (1979) tracks the emergence of the child as an object of governmental concern from the mid-eighteenth century in France, and the corresponding spread of normalising technologies and legal measures that worked to bind the responsibility for children to the family – particularly the mother. As I have established in earlier chapters, the normative structure and internal welfare of the family has continued to be of significant importance to issues of governance – particularly in relation to the welfare of children at divorce. This perspective has seen the growth and spread of normalising technologies, underpinned by legal measures, as a way of managing divorce and binding the responsibility for children to the post-divorce family.

Expert knowledge on child development became crucial to legal decision-making with the emergence of the welfare state in the mid-twentieth century and significantly influenced the way in which the legal concept of the welfare of the child was interpreted at divorce. In Chapter Four I showed how Bowlby’s (1952) ideas on ‘maternal deprivation’, and the importance of the biological mother/child relationship for the child’s emotional development, influenced the way in which decisions of custody and access were made at divorce from the mid-twentieth century. I also indicated how, by the 1970s, new knowledges emerged, with behavioural experts Goldstein and others (1973) arguing for the ‘quality’ of the child’s relationship with their ‘psychological parent’ – who need not necessarily be the mother. This perspective, taken up in family law, shifted the focus of divorce from the status of marriage to the
status of parenthood, with the quality of the parent/child relationship measured by a lack of conflict and a lack of ‘irrational’ negative attitudes. Conflict and disharmony between divorcing parents was considered by behavioural experts to not be in the best interests of the child, and these insights marked the beginning of a non-judgemental perspective on divorce with the demise of matrimonial ‘fault’ and the setting up of a complex apparatus of expert/legal services for regulating and managing the potential conflict of divorce. In this conjuncture divorce no longer meant the end of the family – the divorcing family was to be re-established into the separated or post-divorce family and the focus was now on ‘joint parenting’ and maintaining harmonious post-divorce relations for the sake of the children.

As part of that discussion, I also drew on Elias’s insights that the informalisation and democratisation of the parent/child figuration requires parents "to suppress their passionate impulses and urges" through a “permanent effort of foresight” and a “steady control of conduct” (Elias, 2000, pp. 370, 380). No longer is the relation between parent and child untamed and spontaneous, rather, through a gradual civilising process the chains of interdependence between parents and children have lengthened, and children are now recognised as having their own unique character as a particular group of our society. Following Elias (2000) and van Krieken (1998), and as argued throughout this thesis, the critical point is that in the absence of formal rules a greater degree of restraint needs to be privately exercised over one’s internal emotions. On this view, the civilised parent, and I suggest most particularly the mother, needs to exercise a certain level of foresight and hindsight to civilise her behaviour and control her emotions for the sake of her child. With the current focus on the need to maintain a harmonious post-divorce relationship in the best interests of the child, the rational/responsible/civilised parent/mother is influenced by the compulsory norms of responsible parenting in order to avoid the potential risks posed to the development of her child. Whatever Kate might have thought about Harry and his actions, she was compelled to keep silent, to master her emotions.

**On reason**

As elaborated throughout this thesis, family dispute resolution uses the voice of *reason* to moderate emotion at divorce. I now consider this in more detail by exploring the bifurcation of reason and emotion – that is, reason as ‘sound judgement’ and emotion as the expression of internal feelings or passions. As previously illustrated in Chapter
Five, emotion is traditionally distinguished from reason, quite often in a pejorative sense – with reason relating to knowledge and truth and traditionally coded ‘male’, and emotion relating to the subjective experience of instinctive feeling and traditionally coded ‘female’. The gender-implications of this bifurcation on mediation, with its emphasis on rationality, is to differentially impact on how men and women manage their behaviours during the mediation process, or do or do not feel that their voice and concerns have been heard.

Rustin (2009, p. 22) throws further light on the complexity of the relationship with his argument that we cannot split reason and emotion because “reason is not a faculty separate from, or higher than, emotion” rather, reason is the “reflective capacity human beings have to regulate and elaborate their emotions in the light of their purposes.” The essential issue here, following Rustin (2009), is that in order to understand how reason silences emotion, we need to incorporate reason and emotions into any analysis of the practices of self-restraint in social interactions, for as Barbalet (2002, p. 3) points out “emotions provide instant evaluation of a circumstance” and “influence the disposition of the person for a response to those circumstances.” For Rustin (2009, p. 22), emotions are “powerful motivators and organisers of our behaviour” and “potentially subject to rational evaluation.”

On this view, the negative connotation associated with displaying emotionality, particularly for women, is a significant factor in why mothers silence themselves in mediation. Referring back to my imagined mediation scenario, Kate worked to suppress her emotions relating to her intimate connection to her child – that is, Kate worked to control her anger and frustration at the threat posed by the alternative new family as presented by Harry, and the potential risks this posed to the intimate tie she has with her child; a historical, personal and private tie of intimate experiences and intimate knowledge of her daughter, Iris. Here Kate is attempting to voice her concerns:

I think she will be overwhelmed and frightened (...). She’s only seven years old and I’m her mother. I know her so well. I know what frightens her. I know what she is feeling just by looking at her. I know her. Joy isn’t her mother. She hardly knows Iris. (...) and you want her to take my place. You just want me to become Iris’s mum part-time and let someone else take over. (...) This is a nightmare.

A while later Kate says:

I’ve always looked after her. I’ve always been there for her. I know her so well. I’m her mum – why do you want to change that!
I’m there for her *all of the time*. It’s me that has made the adjustments, not you.

You have this idea of a shiny new family and you want Iris to fit into it. You are trying to make your new family the main one and you’re trying to push me out of the way! You won’t even listen when I try to tell you that Iris is worrying about all of this.

Kate, however, only occasionally voiced her feelings, attempting throughout the mediation session to ‘hold herself in check’. Like Elsa in *The Golden Age*, she knew how she needed to behave when under public scrutiny, so she worked to suppress her anger and frustration at the expectations that she should entrust her child to the legal/expert regime of ‘shared parenting’, and at her inability to protect her child from the norms of expectation being placed on her by this regime. Through a process of rational evaluation Kate knew the codes and norms she had to adhere to while her behaviour as a mother was under scrutiny. She did not want to appear irrational or unreasonable; she needed her voice and concerns to be heard. Rustin (2009, p. 29) elaborates on this point when he states: “Emotions are deemed to be socially acceptable when they are expressed in approved forms (with regard to differences of rank, gender or age, for example), and to be unacceptable when they breach such boundaries.” Even more, Kate knew that if she wished to continue to participate in the process she had to select appropriate emotional responses. To do this she was guided by the norms of emotional self-restraint that limit the expression of particular emotions, in particular settings, by particular people, at particular times; in this instance the norms of family breakdown that guide the rational/responsible parent, who by virtue of being responsible focuses on what is deemed to be in the best interests of her child.

**On the ‘reasonable man’ and its embodiment in law**

As illustrated in Chapter Two Dewar (2000a) maintains that, family law, as a ‘mode of reasoning’ and as a way of framing solutions to ‘radical disagreement’, is perhaps our only hope of finding common ground in the complex circumstances of family breakdown. One of the ‘virtues’ of legal debate, he suggests, “is that it calls us back to the level of practicality or functionality – the question in other words to what will work” (Dewar, 2000a, p. 80). On this view, family law as a ‘mode of reasoning’ works to contain the potentially chaotic and unruly passions of family breakdown by providing a ‘context’, that is, by invoking certain knowledges from other disciplines into legal relevances it ‘lowers the level of abstraction’ to enable an agreement to be reached at
divorce. Throwing further light on this, Smart (1995, p. 11) argues that law claims to have the method to establish the truth of events, and that this ‘claim to truth’ enables it to translate certain knowledges and experiences into legal relevances, while disqualifying “a great deal that might be relevant to the parties.” As she maintains, this does not mean that parties are necessarily silenced, but “how they are allowed to speak, and how their experience is turned into something that law can digest and process, is a demonstration of the power of law to disqualify alternative accounts” (Smart, 1995, p. 11).

The focus on rationality and self-control at divorce is supported by the legal principle of the hypothetical ‘reasonable man’, a standard of behaviour in law that attempts “to provide a criterion for the recognition of acceptable behaviour without introducing into that recognition (in the theory at least) any moral assessment of the behaviour” (Martin, 1994, p. 338). As numerous scholars have pointed out, the ‘reasonable man’ is indeed a man (for example, Lloyd, 1993; Martin, 1994; Smart, 1995). Both the masculinity of the language of the standard, together with the male frame of reference for determining reasonable behaviour, means that the criterion for determining acceptable behaviour can never be ‘gender-neutral’, and as Martin (1994, p. 341) observes, within the reasonable man test, “the female in the law is not represented in autonomous terms, but only as a subset of the male, unacknowledged as having a separate existence.” Parenthood is a gender-neutral concept in law but, as Richard Collier (1999, p. 133) citing Martha Fineman reminds us, “the fact that men and women come before/to the law as already ‘gendered’ subjects living ‘gendered lives’ means that family law itself can never be gender neutral.” This is highly significant to what Kate felt she could and could not say in mediation for within this gender-neutral legal/expert framework of divorce, parents are treated as a unity and no distinction is made between mothers and fathers. This, as I have intimated, makes it difficult for mothers to speak out on the intimacies of their caring abilities without sounding unreasonable or irrational.

**Historical developments**

Let me now turn to the historical developments that have provided such an important part of my attempt to understand the current status of family law and family dispute resolution. Throughout this thesis, I have pointed to the pervasive and evolving presence of law in the regulation of the family, and with this the re-creation of the new
‘post-divorce’ family from at least the mid twentieth-century onward. Modern family law's particular function is to contain support obligations within the family in the shape of the restructured post-divorce family. As established, families are vital to government in economic, social and practical terms as they provide a vast source of emotional, economic and moral support ‘free of charge’, particularly to the benefit of children. Eekelaar (1989) suggests that if the family is disrupted through divorce, and fails to distribute these resources, the government will intervene through a series of legal and behavioural interventions to strengthen the ties of responsibility between parents and children to create a functional post-divorce family. It is here that law depends on a working alliance with behavioural experts to establish the vital links between objectives of the state and the details of daily existence in the home by incorporating expert knowledge on the normative structure and internal welfare of the family. This broad body of knowledge has increasingly influenced the development of legal policy relating to divorce, particularly in relation to the welfare of the child.

From the mid-twentieth century, the dominant discourse of divorce came to revolve around the economic consequences of marriage breakdown as the ‘marriage boom’ of the 1940s had led to an increase in the demand for divorce. Separated women, unable to divorce and remarry, often remained dependent on welfare. The implementation of the Matrimonial Causes Act 1959 acknowledged this increasing demand for divorce, and included one non-fault ground: ‘separation for five years’, which enabled parties to divorce if they had lived apart for five years. The Act also promoted marriage guidance and counselling to encourage reconciliation and appease the critics of divorce. Separation for five years was soon recognised as an unreasonable qualification as marriage counsellors realised they were more likely to be offering separation counselling rather than marriage counselling. Taking these circumstances under review and commissioning reports into divorce in both England in 1966 with the report titled Putting Asunder, and Australia in 1967 with the Family Law Committee's report, it was soon realised there was little the law could do to stop people divorcing, and the best that could be hoped for "was that the marriage could be buried with a minimum of distress" (Dewar, 1998b, p. 476).

As I have elaborated throughout this thesis, with the implementation of the Family Law Act 1975 the focus of law shifted from the status of marriage to issues relating to the impact of divorce on the family, especially the children, with attention now diverted to managing the conflict of divorce for the sake of the children. With this, the concept of matrimonial ‘fault’ as a basis for divorce was abolished, and in its place a single ground
of 'irretrievable breakdown' was installed in legislation – that is, that the parties have lived separately and apart for a continuous period of twelve months. The primary concern of the family law process became issues relating to the impact of divorce on the family, especially the children. On this view the new family court was to be a 'caring court' that offered a wide range of dispute resolution and other services to manage family disputes. Here we have the protective role of the family court towards children in divorce proceedings embodied in the FLA where it underlines the message of parental duty and responsibility, and ties it directly to parental cooperation, agreement and the resolution of conflict for the sake of the child – and this perspective forms the content of the 'radiated message' of divorce as supported in legislation. In line with this, and as Day Sclater and Piper (1999a) observe, divorce was in the process of being reconstituted as merely a 'transition' in family life, rather than pathologised as a disaster; divorce here was in the process of being 'normalised'.

These developments have had particular and continuing implications for women. As traced in Chapter Two, historically, marriage was considered necessary for women's economic survival, and legislation was enacted from the late eighteenth century to ensure this perspective was not disrupted. Hardwicke's *Marriage Act* of 1753 regulated marriage for the purpose of ensuring a crucial alliance between wealthy families for matters of inheritance – marriage here was useful for the economic security of wealthy families, and women were dependent on marrying 'well' as their future economic and moral security depended on it. The flouting of Hardwicke's Act by the poor caused problems for government and this required new methods of regulation. The implementation of the *Poor Law Amendment Act 1834*, *Civil Marriage Act 1836*, and the *Births and Deaths Registration Act 1836*, set up a system of registration whereby a board of elected guardians were able to monitor relationships between claimants of poor relief, and encourage marriage as an alternative. Poor relief was conditional on working, and workhouses operated under a strict regime of hard work and restricted diet to make marriage more appealing to women for their survival. Here, we see that poor women's position in marriage was also one of economic survival, and if she was already pregnant then the lever of the Poor Law could be used to 'enforce' a marriage.

With the increase in demand for divorce in the mid-nineteenth century, coupled with demands made by married women for the protection of their property, the enactment of the *Divorce and Matrimonial Causes Act 1857* allowed for divorce in strictly limited circumstances based on the legal concept of 'fault'. This concept was based on a sexual 'double standard', for while the husband could divorce his wife for adultery, a wife
could only divorce if she could prove her husband’s ‘aggravated adultery’, perpetuating and institutionalising “in a very real sense the inequality of the sexes” (Young et al., 2013, p. 12). The outcome of this double standard potentially trapped many women in difficult and unhappy adulterous marriages. As previously highlighted, adultery remained the only ground for divorce until the early twentieth century.

With the implementation of the *Family Law Act 1975* the focus on parenthood, rather than wives and husbands, changed the way law perceived the management of divorce, with attention now directed at managing the conflict of divorce for the sake of the children. Women, at divorce, were now perceived as gender-neutral ‘responsible parents’ limiting the capacity for recognition of their stories of everyday life, for example the intimate details and nuances of motherhood. With this to return to my central point, women’s stories are potentially concealed or excluded from the normative expectations of the ‘shared parenting’ regime and considerations of the ‘best interests’ of the child.

As traced above, the persuasions of law might seem invincible, but this is not so. Law has its own limits, and represents a changing set of configurations to changing social circumstances. Law, too, is not uniform, nor are its practitioners, as illustrated by Rose and Valverde’s (1998) argument, that in reality there is no such thing as ‘the’ law, simply a body of evolving actions and precedents. Something of the changing nature, and the doubts of practitioners, occurs in McEwan’s (2014) *The Children Act*. Here a High Court judge in the Family Division, Fiona Maye, has to make a decision on whether it is lawful for a London hospital to proceed with a blood transfusion against the wishes of a child/young man, Adam Henry, who will be an adult in three months when he turns eighteen. Adam and his parents are refusing consent because they are Jehovah Witnesses. If Adam does not receive treatment he will most likely die or be left severely disabled. As Fiona considers the situation, she ruminates on the possibilities open to her and reflects on the limitations of her profession:

On the other side of the city a teenager confronted death for his own or his parents’ beliefs. It was not her business or mission to save him, but to decide what was reasonable and lawful. She would have liked to see this boy for herself, remove herself from (...) the courtroom, for an hour or two, take the journey, immerse herself in the intricacies, fashion a judgement formed by her own observations. The parents’ beliefs may be an affirmation of their son’s, or a death sentence he may not challenge. These days finding out for yourself was highly unconventional. (...) Nowadays, social workers from Cafcass did the job and reported back. (...) Now, fewer delays, more boxes to tick, more to be taken on trust. The lives of children
were held in computer memory, accurately, but rather less kindly (McEwan, 2014, pp. 35-36).

McEwan's imaginative representation of the legal process also illustrates its dexterous nature whereby new insights relating to the ‘welfare’ of children are variously obscured, given central consideration, and, more recently computerised. One of the most central and persuasive of these notions, to which I now turn, is the notion of the ‘best interests’ of the child.

The ‘persuasions’ of legal and expert discourse: The ‘best interests’ of the child

Amplified at divorce, and throughout this thesis, is the ‘radiated message’ of the ‘good’ divorce. The broad range of developments in family law, as outlined above and tracked throughout this thesis, serve to highlight how expert knowledge on the welfare of the child has significantly influenced the way in which the ‘best interests’ of the child principle has increasingly developed in family law to become a central component in ensuring that rational/responsible parents will put their concerns to one side in mediation to reach an agreement on behalf of their child. This norm, codified in law, is enforceable if parents desist in actively cooperating in their own self-governance. The Family Law Act emphasises that while parents have duties and responsibilities, children have ‘rights’, including the right to a continuing relationship with each parent after divorce. Here we have a combination of discourses represented in the ‘best interests’ principle, with a welfare emphasis on protecting the rights of the vulnerable child, and, at the same time, an advanced-liberal emphasis on parental responsibility, and the calculation and management of risk. This overlap encourages parents to act ‘responsibly’ in mediation, but, critically, if they fail to do so, the ‘best interests’ of the child principle allows the state to act in a directive fashion. This sanctioning capacity of the ‘best interest’ principle emphasises the ‘real function’ of the standard, as argued by Théry (1986), that is, to function as a principle for regulating the post-divorce family.

As Théry (1986, p. 79) has observed, the focus on the child, as one who may bear the costs of the conflict and divorce, not only entails the promotion of a variety of norms about what constitutes their best interest, it also “constitutes a norm itself.” As such, there is little room to acknowledge the difficulties parents face in the wake of their relationship breakdown: “The good parent is one who needs nothing, above all not the presence and love of his [sic] child: a genuine taboo imposes silence on the needs of the parents, especially their emotional needs” (Théry, 1986, p. 350, original emphasis). The
‘best interests’ of the child principle "necessarily develops into a general image of what the ‘good’ post-divorce family organisation should be", and acts as a mechanism of social control regulating the post-divorce family, “possibly even to the detriment of the infant in the case” (Théry, 1986, pp. 345, 347). Following Théry (1986), van Krieken (2005, p. 45) makes the observation that in private family law, the ‘best interests’ of the child principle ‘really’ functions, to govern disputes between the parents, "with the belief apparently built into the development of Western family law that it fulfils this function more effectively when such a recognition is never made explicit.” More broadly, these insights highlight the nature of the hidden mechanisms of law which remain as a ‘pure limit set on freedom’, tied to appropriate conduct or self-control in mediation. As with family law more generally, these trail a long historical genealogy, to which I now turn.

**Historical developments**

As set out in Chapter Four, the historical developments relating to the consideration of the child in law can be traced to the seventeenth century with the ‘empire of the father’, where all legitimate children were legally recognised as their father’s property and legitimate heirs, and as such, fathers’ were able to control and deny mothers’ access to their children. Throughout the seventeenth, eighteenth and nineteenth centuries ‘father right’ was so extensive that it was taken for granted and absolute, rising to be a ‘sacred right’ by the late nineteenth century. This recognition motivated demands for change in the law to ‘equal rights to custody’ for mothers, resulting in a compromise whereby the court acknowledged that a mother could ‘make an application for custody’ with regard to the ‘welfare of the child’. This did not alter the father’s absolute right while the marriage legally existed, but it did mark the beginning of considerations of the ‘welfare of the child’. By 1925 the ‘welfare principle’ was elevated through the *Guardianship of Infants Act 1925* to the ‘first and paramount consideration’ in all cases concerning children. This changed the way a child was perceived in law – it marked a shift away from the legal view of a father’s absolute right to an acknowledgement of a certain level of neutrality between mothers’ and fathers’ claims to their children’s welfare, and, henceforth, all custody claims were governed by the ‘welfare principle’, that is the emotional, physical and moral welfare of the child.

As earlier indicated, the mid-twentieth century saw significant changes in the way parenting was conceived. Women’s increasing access to education, employment, birth
control, and the increasing demand for divorce, unsettled the ‘norms’ of the ‘naturalness’ of the domestic and maternal role of motherhood, which was tied to the concept of ‘maternal deprivation’. By the 1970s the focus on parenting shifted to the ‘quality’ of the parent/child relationship, and children’s interests became the primary concern at family breakdown, with the legal focus shifting from the status of marriage to the status of parenthood at divorce. Parents were encouraged to be economically and morally ‘responsible’ for the welfare of their children, and this meant reaching an agreement on parenting matters and avoiding conflict. This was supported by insights from behavioural science experts and endorsed in legislation. Throughout the late twentieth and early twenty-first century, the perspective of family law has continued to focus on parental ‘responsibility’, with the added criteria that children have the ‘right’ to be cared for, and have regular contact with, both of their parents. This focus on continued parental ‘responsibility’, in the shape of joint responsibilities and ‘shared parenting’ after divorce, emphasises the shift in family law to the view that, though the marriage may have ended, parenthood is for life.

As part of these developments in family law there has been a corresponding increase in education, support and counselling services available to divorcing parents to guide them through the divorce process, with an emphasis on keeping parents out of court and diverting them to family dispute resolution where they are legally required to make a ‘genuine effort’ to reach an agreement on future parenting arrangements. Failure to attend family dispute resolution or to make a ‘genuine effort’ to resolve issues can result in “severe financial penalties” (Young et al., 2013, p. 65).

**Silenced by reason: The ‘civilised’ parent and the ‘flattened’ child**

As established in Chapter Five, the compulsory nature of family dispute resolution (excluding exceptional circumstances) creates an explicit framework for how matters involving children at divorce are to be managed, that is, ‘responsible’ parents are to negotiate an agreement about their future ‘shared parenting’ plans, rather than depend on a judicial determination, and in the process avoid present and future conflict for the sake of their child. Any decision parents’ reach must be made with reference to the ‘best interests’ of the child, and the powerful rhetoric of the ‘good’ divorce which

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72 FLA s 60I(1)
73 FLA s 60I(9)
prioritises a *particular image of the child* of divorce – she is vulnerable and potentially damaged by the negative impact of conflict, and her welfare requires "the removal of reasons and opportunities for parents to 'fight' over their divorce" (Day Sclater & Piper, 2001, p. 421). On this view, parents are encouraged to suppress their emotional needs in order to reach an agreement and mitigate the potential 'damage' to their 'vulnerable' child (Day Sclater & Piper, 1999b; Neale & Smart, 1999).

As outlined in Chapter Five, the ‘reasonable’ parent’s obligations extend to protecting their child’s development well into adulthood. This kind of awareness is illustrated in my imagined representation when, in her opening statement, Kate shows herself well aware of the ‘compulsory norm’ of the ‘best interests’ of the child:

Of course I want what’s best for Iris. That is the most important thing. I don’t want her to grow up with any issues about her mum and dad’s divorce. I will do anything to avoid that. I want her to have as normal a childhood as possible. (...) I know we can’t change the fact that we have messed up our marriage, but hopefully, we can make sure we don’t mess up Iris’s future.

Later on, when negotiations become emotionally charged, their mediator, Martin makes a strategic adjustment to reaffirm the rational/civilised perspective of mediation by reminding Kate and Harry of the normative and legislative expectations of family breakdown:

Okay, we can definitely agree that Iris is important to both of you (...). You both agree that it is important for Iris to spend time with both of you, and that Iris’s welfare is your priority – so that is fantastic. That is the focus we want to maintain as we work towards the best possible outcome for Iris in all of this.

He then passes Kate and Harry an official brochure on child development, bringing their focus back to the potential 'damage' their child may bear if they do not negotiate in her 'best interests' – as deemed by 'psy' experts. At the same time he reminds them of the legal sanctions implicit in the 'best interests' of the child principle when he tells them that if they fail to make a decision in mediation then the decision will be made for them in the family court. As he states:

It is also important to acknowledge that if you can’t reach an agreement in mediation, and you end up in the Family Court, the court will make all the decisions for you.
I intended these passages to illustrate how the process and practices of mediation help to "shape the stories" that are told (Day Sclater, 1999a, p. 179), by sidelining or silencing issues officially deemed to be irrelevant to the desired outcome. Kate is only able to speak as a 'responsible' parent negotiating a harmonious ‘shared-parenting’ post-divorce future for the sake of her child. The normatively and legally constructed image of the child under discussion emerges as a pivotal element in ensuring that she will exercise a high degree of hindsight, foresight and self-restraint – and in the process, impose silence on her own emotional needs. The image of this child is loaded with legal and normative expectations of the 'good' divorce – it is a child known by reason.

Referring back to my imagined mediation scenario, Kate attempted to speak from an intimate position as Iris’s mother and bring some details of her essential personality into the room:

Iris (...) likes a quiet life; she likes her garden, her dog, her friends, her Grandparents and cousins who all live nearby.

She likes living with me, and I know that sounds presumptive but it's not – it's just the way it is. It is so difficult to tell you what I know about what is best for Iris without it sounding selfish. I know her so well. I’m her Mother and I know her. I can't explain how that works, and I know it sounds like I'm cancelling you out Harry, but I'm not.

Kate realises that in attempting to bring Iris's individuality and essential personality into the room she risks sounding 'presumptive', 'selfish' and apologises for sounding exclusive. At another stage she states, ‘How can I explain how Iris feels about all of this without it sounding as if I’m putting words in her mouth?’ The point I am trying to make here is that however Kate attempts to speak about her child, she can only speak to the rationally constructed child under discussion, and the everyday reality of her particular parenting knowledge and experiences are obscured. I contend that a child known by reason is a limited child, created through the expectations and objectives of the 'good' divorce, and as such, this child is denied any emotional connection to a particular parent. As such, in mediation mothers' (and fathers’) are potentially silenced, as to speak of an intimate and particular emotional connection is to operate in an entirely different discourse from that pertaining to the legally constructed and remote child under review. This has implications for the child as well as her parents, and, in my construction, most particularly her mother as the one most often charged with her day-to-day care. For the mother, and as stressed throughout, there is the silencing of
intimate knowledge and distinctive bond. For the *child*, and here Iris, so often obscured, represented as only a photo on the table, there is a certain disappearance, a flattening, whereby her ‘knowability’ becomes subject to developmental tables and expert generalisations rather than the one who has very particular proclivities, pleasures and pains.

**Concluding reflections**

My exploration of how the intensity of feeling and disagreement between parents with dependent children is managed at divorce has been both a challenging and insightful journey that has taken me along many pathways. In finding my way into understanding the complexities of family breakdown I followed a track guided by the compelling insights of Foucault, Donzelot, and Elias, insights that allowed me to develop an analytical framework to investigate the intricacies of the legal and extra-legal processes and practices that work to regulate or civilise the post-divorce family. In doing so, I was able to illuminate how parents’ civilising impulse to self-restraint, coupled with the dominant legal/welfare discourse of the harmonious divorce, and the myth of gender-neutrality, come to bear on the way in which divorcing parents moderate their emotions at divorce; and in particular, how the paramount focus on the ‘best interests’ of the child principle – loaded with legal and normative expectations of the ‘good’ divorce – makes it difficult for parents to express emotion without sounding unreasonable or self-serving.

My interest has consistently been on the silencing of certain issues at divorce, specifically the silencing of emotion in the mediation process within family dispute resolution, and though my understanding of how this happened to Kate in mediation has been illuminated through my theoretical scrutiny of the mediation process, I am still curious as to how she may have been able to speak louder than the background noise of law and the experts who were telling her what was best for her child, a child they did not know. As I reflect on this question I note Day Sclater’s (1999b, pp. 180-181) observation, that the dominant discourses of harmony have ‘rooted us in a fantasy’ of predictability, co-operation and harmony:

> It is indeed ironic that the psychological hold which discourses of harmony have over us is rooted in a fantasy that our emotional lives can be rendered smooth and predictable, that the pain of divorce can be minimised, if not eliminated altogether; for as long as co-operation and harmony are idealised, it is unlikely that the destructive feelings which underlie conflict
can be properly owned, or the conflicts truly resolved. An awareness and acceptance of our own darker natures, paradoxically, might mitigate our compulsion to act out or to expel our bad parts into others, thus laying the essential foundation for achieving a truly civilised divorce.

As I have illustrated, the dominance of a legal/welfare perspective on the child at divorce not only silences matters deemed by mothers and fathers to be significant to the decision-making process, it also obscures the particular nature of the mother/father/child relation – that is, the legal/welfare discourse at divorce sets out a rational criteria for consideration and compliance in relation to a child's 'best interests', yet sometimes, as Thèry (1986, p. 345) maintains, this rational focus can be to the detriment of the child herself. I suggest that it is only when we acknowledge that a child cannot be known by reason, and instead recognise a child at divorce as an emotional being, with private and nuanced needs and desires, that we will begin to ‘hear’ the individual voices of parents as mothers and fathers, rather than the rational, co-operative, harmonious, predictable voice of the ‘responsible parent’.
Appendix

*Family Law Act 1975: Part VII – Children (s60-s65)*

Part VII—Children

Division 1—Introductory

Subdivision A—What this Division does

60A What this Division does

This Division contains:

(a) a statement of the object of this Part and the principles underlying it, and an outline of this Part (Subdivision B); and

(aa) provisions dealing with the best interests of the child in court proceedings (Subdivision BA); and

(ab) provisions dealing with an adviser’s obligations in relation to the best interests of the child (Subdivision BB); and

(b) provisions relevant to the interpretation and application of this Part (Subdivision C); and

(c) provisions relevant to how this Act applies to certain children (Subdivision D); and

(d) provisions about the use of family dispute resolution before applying for an order under this Part (Subdivision E).

Note: The extension and application of this Part is also dealt with in Subdivision F of Division 12.

Subdivision B—Object, principles and outline

60B Objects of Part and principles underlying it

(1) The objects of this Part are to ensure that the best interests of children are met by:

(a) ensuring that children have the benefit of both of their parents having a meaningful involvement in their lives, to the maximum extent consistent with the best interests of the child; and

(b) protecting children from physical or psychological harm from being subjected to, or exposed to, abuse, neglect or family violence; and

(c) ensuring that children receive adequate and proper parenting to help them achieve their full potential; and

(d) ensuring that parents fulfil their duties, and meet their responsibilities, concerning the care, welfare and development of their children.
(2) The principles underlying these objects are that (except when it is or would be contrary to a child’s best interests):

(a) children have the right to know and be cared for by both their parents, regardless of whether their parents are married, separated, have never married or have never lived together; and

(b) children have a right to spend time on a regular basis with, and communicate on a regular basis with, both their parents and other people significant to their care, welfare and development (such as grandparents and other relatives); and

(c) parents jointly share duties and responsibilities concerning the care, welfare and development of their children; and

(d) parents should agree about the future parenting of their children; and

(e) children have a right to enjoy their culture (including the right to enjoy that culture with other people who share that culture).

(3) For the purposes of subparagraph (2)(e), an Aboriginal child’s or Torres Strait Islander child’s right to enjoy his or her Aboriginal or Torres Strait Islander culture includes the right:

(a) to maintain a connection with that culture; and

(b) to have the support, opportunity and encouragement necessary:
   (i) to explore the full extent of that culture, consistent with the child’s age and developmental level and the child’s views; and
   (ii) to develop a positive appreciation of that culture.

(4) An additional object of this Part is to give effect to the Convention on the Rights of the Child done at New York on 20 November 1989.


60C Outline of Part

An outline of this Part is set out below.

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| 13   | **Division 13—State, Territory and overseas orders**  
- registration of State and Territory orders dealing with children  
- registration of overseas orders dealing with children  
- transmission of Australian orders to overseas jurisdictions |
| 13A  | **Division 13A—Enforcement of orders affecting children**  
- court may do any or all of the following:  
  (a) require a person who contravenes an order affecting children to participate in an appropriate post-separation parenting program designed to help in the resolution of conflicts about parenting;  
  (b) make a further parenting order that compensates a person for time that a child did not spend with the person, or for time that a child did not live with the person, as a result of the contravention;  
  (c) adjourn the proceedings to enable an application to be made for a further parenting order;  
- court must take other action in respect of a person who contravenes an order affecting children if the court is satisfied:  
  (a) where the contravention is an initial contravention—that the person has behaved in a way that showed a serious disregard for his or her parenting obligations; or  
  (b) where the contravention is a second or subsequent contravention—that it is not appropriate for the person to be dealt with by requiring his or her attendance at a post-separation parenting program; |
| 14   | **Division 14—Miscellaneous**  
- miscellaneous matters relating to children |

**Subdivision BA—Best interests of the child: court proceedings**

**60CA  Child’s best interests paramount consideration in making a parenting order**

In deciding whether to make a particular parenting order in relation to a child, a court must regard the best interests of the child as the paramount consideration.

**60CB  Proceedings to which Subdivision applies**

(1) This Subdivision applies to any proceedings under this Part in which the best interests of a child are the paramount consideration.

Note: Division 10 also allows a court to make an order for a child’s interests to be independently represented by a lawyer in proceedings under this Part in which the best interests of a child are the paramount consideration.

(2) This Subdivision also applies to proceedings, in relation to a child, to which subsection 60G(2), 63F(2) or 63F(6) or section 68R applies.

**60CC  How a court determines what is in a child’s best interests**

*Determining child’s best interests*

(1) Subject to subsection (5), in determining what is in the child’s best interests, the court must consider the matters set out in subsections (2) and (3).
Primary considerations

(2) The primary considerations are:
   (a) the benefit to the child of having a meaningful relationship with both of the child’s parents; and
   (b) the need to protect the child from physical or psychological harm from being subjected to, or exposed to, abuse, neglect or family violence.

Note: Making these considerations the primary ones is consistent with the objects of this Part set out in paragraphs 60B(1)(a) and (b).

(2A) 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).

Additional considerations

(3) Additional considerations are:
   (a) any views expressed by the child and any factors (such as the child’s maturity or level of understanding) that the court thinks are relevant to the weight it should give to the child’s views;
   (b) the nature of the relationship of the child with:
      (i) each of the child’s parents; and
      (ii) other persons (including any grandparent or other relative of the child);
   (c) the extent to which each of the child’s parents 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;
   (ca) the extent to which each of the child’s parents has fulfilled, or failed to fulfil, the parent’s obligations to maintain the child;
   (d) the likely effect of any changes in the child’s circumstances, including the likely effect on the child of any separation from:
      (i) either of his or her parents; or
      (ii) any other child, or other person (including any grandparent or other relative of the child), with whom he or she has been living;
   (e) the practical difficulty and expense of a child spending time with and communicating with a parent and whether that difficulty or expense will substantially affect the child’s right to maintain personal relations and direct contact with both parents on a regular basis;
   (f) the capacity of:
      (i) each of the child’s parents; and
      (ii) any other person (including any grandparent or other relative of the child);
      to provide for the needs of the child, including emotional and intellectual needs;
   (g) the maturity, sex, lifestyle and background (including lifestyle, culture and traditions) of the child and of either of the child’s parents, and any other characteristics of the child that the court thinks are relevant;
   (h) if the child is an Aboriginal child or a Torres Strait Islander child:
(i) the child’s right to enjoy his or her Aboriginal or Torres Strait Islander culture (including the right to enjoy that culture with other people who share that culture); and

(ii) the likely impact any proposed parenting order under this Part will have on that right;

(i) the attitude to the child, and to the responsibilities of parenthood, demonstrated by each of the child’s parents;

(j) any family violence involving the child or a member of the child’s family;

(k) if a family violence order applies, or has applied, to the child or a member of the child’s family—any relevant inferences that can be drawn from the order, taking into account the following:

(i) the nature of the order;

(ii) the circumstances in which the order was made;

(iii) any evidence admitted in proceedings for the order;

(iv) any findings made by the court in, or in proceedings for, the order;

(v) any other relevant matter;

(l) whether it would be preferable to make the order that would be least likely to lead to the institution of further proceedings in relation to the child;

(m) any other fact or circumstance that the court thinks is relevant.

Consent orders

(5) If the court is considering whether to make an order with the consent of all the parties to the proceedings, the court may, but is not required to, have regard to all or any of the matters set out in subsection (2) or (3).

Right to enjoy Aboriginal or Torres Strait Islander culture

(6) For the purposes of paragraph (3)(h), an Aboriginal child’s or a Torres Strait Islander child’s right to enjoy his or her Aboriginal or Torres Strait Islander culture includes the right:

(a) to maintain a connection with that culture; and

(b) to have the support, opportunity and encouragement necessary:

(i) to explore the full extent of that culture, consistent with the child’s age and developmental level and the child’s views; and

(ii) to develop a positive appreciation of that culture.

60CD How the views of a child are expressed

(1) Paragraph 60CC(3)(a) requires the court to consider any views expressed by a child in deciding whether to make a particular parenting order in relation to the child. This section deals with how the court informs itself of views expressed by a child.

(2) The court may inform itself of views expressed by a child:

(a) by having regard to anything contained in a report given to the court under subsection 62G(2); or

(b) by making an order under section 68L for the child’s interests in the proceedings to be independently represented by a lawyer; or

(c) subject to the applicable Rules of Court, by such other means as the court thinks appropriate.

Note 1: Paragraph (a)—subsection 62G(3A) generally requires the person giving the report to ascertain the child’s views and include those views in the report.
Note 2: Paragraph (b)—paragraph 68LA(5)(b) requires the independent children’s lawyer for the child to ensure that the child’s views are fully put before the court.

60CE Children not required to express views

Nothing in this Part permits the court or any person to require the child to express his or her views in relation to any matter.

60CF Informing court of relevant family violence orders

(1) If a party to the proceedings is aware that a family violence order applies to the child, or a member of the child’s family, that party must inform the court of the family violence order.

(2) If a person who is not a party to the proceedings is aware that a family violence order applies to the child, or a member of the child’s family, that person may inform the court of the family violence order.

(3) Failure to inform the court of the family violence order does not affect the validity of any order made by the court.

60CG Court to consider risk of family violence

(1) In considering what order to make, the court must, to the extent that it is possible to do so consistently with the child’s best interests being the paramount consideration, ensure that the order:
   (a) is consistent with any family violence order; and
   (b) does not expose a person to an unacceptable risk of family violence.

(2) For the purposes of paragraph (1)(b), the court may include in the order any safeguards that it considers necessary for the safety of those affected by the order.

60CH Informing court of care arrangements under child welfare laws

(1) If a party to the proceedings is aware that the child, or another child who is a member of the child’s family, is under the care (however described) of a person under a child welfare law, that party must inform the court of the matter.

(2) If a person who is not a party to the proceedings is aware that the child, or another child who is a member of the child’s family, is under the care (however described) of a person under a child welfare law, that person may inform the court of the matter.

(3) Failure to inform the court of the matter does not affect the validity of any order made by the court. However, this subsection does not limit the operation of section 69ZK (child welfare laws not affected).

60CI Informing court of notifications to, and investigations by, prescribed State or Territory agencies

(1) If:
   (a) a party to the proceedings is aware that the child, or another child who is a member of the child’s family, is or has been the subject of:
      (i) a notification or report (however described) to a prescribed State or Territory agency; or
(ii) an investigation, inquiry or assessment (however described) by a prescribed State or Territory agency; and
(b) the notification, report, investigation, inquiry or assessment relates to abuse, or an allegation, suspicion or risk of abuse;
that party must inform the court of the matter.

(2) If:
(a) a person who is not a party to the proceedings is aware that the child, or another child who is a member of the child’s family, is or has been the subject of:
(i) a notification or report (however described) to a prescribed State or Territory agency; or
(ii) an investigation, inquiry or assessment (however described) by a prescribed State or Territory agency; and
(b) the notification, report, investigation, inquiry or assessment relates to abuse, or an allegation, suspicion or risk of abuse;
that person may inform the court of the matter.

(3) Failure to inform the court of the matter does not affect the validity of any order made by the court.

(4) In this section:

prescribed State or Territory agency means an agency that is a prescribed State or Territory agency for the purpose of section 69ZW.

Subdivision BB—Best interests of the child: adviser’s obligations

60D Adviser’s obligations in relation to best interests of the child

(1) If an adviser gives advice or assistance to a person about matters concerning a child and this Part, the adviser must:
(a) inform the person that the person should regard the best interests of the child as the paramount consideration; and
(b) encourage the person to act on the basis that the child’s best interests are best met:
(i) by the child having a meaningful relationship with both of the child’s parents; and
(ii) by the child being protected from physical or psychological harm from being subjected to, or exposed to, abuse, neglect or family violence; and
(iii) in applying the considerations set out in subparagraphs (i) and (ii)—by giving greater weight to the consideration set out in subparagraph (ii).

(2) In this section:

adviser means a person who is:
(a) a legal practitioner; or
(b) a family counsellor; or
(c) a family dispute resolution practitioner; or
(d) a family consultant.
Subdivision C—Interpretation and application of Part

60E Application of Part to void marriages

This Part applies in relation to a purported marriage that is void as if:
(a) the purported marriage were a marriage; and
(b) the parties to the purported marriage were husband and wife.

Subdivision D—Interpretation—how this Act applies to certain children

60EA Definition of de facto partner

For the purposes of this Subdivision, a person is the de facto partner of another person if:
(a) a relationship between the person and the other person (whether of the same sex or a different sex) is registered under a law of a State or Territory prescribed for the purposes of section 2E of the Acts Interpretation Act 1901 as a kind of relationship prescribed for the purposes of that section; or
(b) the person is in a de facto relationship with the other person.

60F Certain children are children of marriage etc.

(1) A reference in this Act to a child of a marriage includes, subject to subsection (3), a reference to each of the following children:
(a) a child adopted since the marriage by the husband and wife or by either of them with the consent of the other;
(b) a child of the husband and wife born before the marriage;
(c) a child who is, under subsection 60H (1) or section 60HB, the child of the husband and wife.

(2) A reference in this Act to a child of a marriage includes a reference to a child of:
(a) a marriage that has been terminated by divorce or annulled (in Australia or elsewhere); or
(b) a marriage that has been terminated by the death of one party to the marriage.

(3) A child of a marriage who is adopted by a person who, before the adoption, is not a prescribed adopting parent ceases to be a child of that marriage for the purposes of this Act.

(4) The following provisions apply in relation to a child of a marriage who is adopted by a prescribed adopting parent:
(a) if a court granted leave under section 60G for the adoption proceedings to be commenced—the child ceases to be a child of the marriage for the purposes of this Act;
(b) in any other case—the child continues to be a child of the marriage for the purposes of this Act.

(4A) To avoid doubt, for the purposes of this Act, a child of a marriage is a child of the husband and of the wife in the marriage.

(5) In this section:
this Act includes:

(a) the standard Rules of Court; and
(b) the related Federal Circuit Court Rules.

60G Family Court may grant leave for adoption proceedings by prescribed adopting parent

(1) Subject to subsection (2), the Family Court, the Supreme Court of the Northern Territory or the Family Court of a State may grant leave for proceedings to be commenced for the adoption of a child by a prescribed adopting parent.

(2) In proceedings for leave under subsection (1), the court must consider whether granting leave would be in the child’s best interests, having regard to the effect of paragraph 60F(4)(a), or paragraph 60HA(3)(a), and of sections 61E and 65J.

Note: Sections 60CB to 60CG deal with how a court determines a child’s best interests.

60H Children born as a result of artificial conception procedures

(1) If:
(a) a child is born to a woman as a result of the carrying out of an artificial conception procedure while the woman was married to, or a de facto partner of, another person (the other intended parent); and
(b) either:
   (i) the woman and the other intended parent consented to the carrying out of the procedure, and any other person who provided genetic material used in the procedure consented to the use of the material in an artificial conception procedure; or
   (ii) under a prescribed law of the Commonwealth or of a State or Territory, the child is a child of the woman and of the other intended parent;

then, whether or not the child is biologically a child of the woman and of the other intended parent, for the purposes of this Act:

(c) the child is the child of the woman and of the other intended parent; and
(d) if a person other than the woman and the other intended parent provided genetic material—the child is not the child of that person.

(2) If:
(a) a child is born to a woman as a result of the carrying out of an artificial conception procedure; and
(b) under a prescribed law of the Commonwealth or of a State or Territory, the child is a child of the woman;

then, whether or not the child is biologically a child of the woman, the child is her child for the purposes of this Act.

(3) If:
(a) a child is born to a woman as a result of the carrying out of an artificial conception procedure; and
(b) under a prescribed law of the Commonwealth or of a State or Territory, the child is a 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 this Act.
(5) For the purposes of subsection (1), a person is to be presumed to have consented to an artificial conception procedure being carried out unless it is proved, on the balance of probabilities, that the person did not consent.

(6) In this section:

*this Act* includes:

(a) the standard Rules of Court; and

(b) the related Federal Circuit Court Rules.

### 60HA  Children of de facto partners

(1) For the purposes of this Act, a child is the child of a person who has, or had, a de facto partner if:

(a) the child is a child of the person and the person’s de facto partner; or

(b) the child is adopted by the person and the person’s de facto partner or by either of them with the consent of the other; or

(c) the child is, under subsection 60H(1) or section 60HB, a child of the person and the person’s de facto partner.

This subsection has effect subject to subsection (2).

(2) A child of current or former de facto partners ceases to be a child of those partners for the purposes of this Act if the child is adopted by a person who, before the adoption, is not a prescribed adopting parent.

(3) The following provisions apply in relation to a child of current or former de facto partners who is adopted by a prescribed adopting parent:

(a) if a court granted leave under section 60G for the adoption proceedings to be commenced—the child ceases to be a child of those partners for the purposes of this Act;

(b) in any other case—the child continues to be a child of those partners for the purposes of this Act.

(4) In this section:

*this Act* includes:

(a) the standard Rules of Court; and

(b) the related Federal Circuit Court Rules.

### 60HB  Children born under surrogacy arrangements

(1) If a court has made an order under a prescribed law of a State or Territory to the effect that:

(a) a child is the child of one or more persons; or

(b) each of one or more persons is a parent of a child;

then, for the purposes of this Act, the child is the child of each of those persons.

(2) In this section:

*this Act* includes:

(a) the standard Rules of Court; and

(b) the related Federal Circuit Court Rules.
Subdivision E—Family dispute resolution

60I Attending family dispute resolution before applying for Part VII order

Object of this section

(1) The object of this section is to ensure that all persons who have a dispute about matters that may be dealt with by an order under this Part (a Part VII order) make a genuine effort to resolve that dispute by family dispute resolution before the Part VII order is applied for.

Phase 1 (from commencement to 30 June 2007)

(2) The dispute resolution provisions of the Family Law Rules 2004 impose the requirements for dispute resolution that must be complied with before an application is made to the Family Court of Australia for a parenting order.

(3) By force of this subsection, the dispute resolution provisions of the Family Law Rules 2004 also apply to an application to a court (other than the Family Court of Australia) for a parenting order. Those provisions apply to the application with such modifications as are necessary.

(4) Subsection (3) applies to an application for a parenting order if the application is made:
   (a) on or after the commencement of this section; and
   (b) before 1 July 2007.

Phase 2 (from 1 July 2007 to 30 June 2008)

(5) Subsections (7) to (12) apply to an application for a Part VII order in relation to a child if:
   (a) the application is made on or after 1 July 2007 and before 1 July 2008; and
   (b) none of the parties to the proceedings on the application has applied, before 1 July 2007, for a Part VII order in relation to the child.

Phase 3 (from 1 July 2008)

(6) Subsections (7) to (12) apply to all applications for a Part VII order in relation to a child that are made on or after 1 July 2008.

Requirement to attempt to resolve dispute by family dispute resolution before applying for a parenting order

(7) Subject to subsection (9), a court exercising jurisdiction under this Act must not hear an application for a Part VII order in relation to a child unless the applicant files in the court a certificate given to the applicant by a family dispute resolution practitioner under subsection (8). The certificate must be filed with the application for the Part VII order.

Certificate by family dispute resolution practitioner

(8) A family dispute resolution practitioner may give one of these kinds of certificates to a person:
   (a) a certificate to the effect that the person did not attend family dispute resolution with the practitioner and the other party or parties to the
proceedings in relation to the issue or issues that the order would deal with, but the person’s failure to do so was due to the refusal, or the failure, of the other party or parties to the proceedings to attend;

(aa) a certificate to the effect that the person did not attend family dispute resolution with the practitioner and the other party or parties to the proceedings in relation to the issue or issues that the order would deal with, because the practitioner considers, having regard to the matters prescribed by the regulations for the purposes of this paragraph, that it would not be appropriate to conduct the proposed family dispute resolution;

(b) a certificate to the effect that the person attended family dispute resolution with the practitioner and the other party or parties to the proceedings in relation to the issue or issues that the order would deal with, and that all attendees made a genuine effort to resolve the issue or issues;

(c) a certificate to the effect that the person attended family dispute resolution with the practitioner and the other party or parties to the proceedings in relation to the issue or issues that the order would deal with, but that the person, the other party or another of the parties did not make a genuine effort to resolve the issue or issues;

(d) a certificate to the effect that the person began attending family dispute resolution with the practitioner and the other party or parties to the proceedings in relation to the issue or issues that the order would deal with, but that the practitioner considers, having regard to the matters prescribed by the regulations for the purposes of this paragraph, that it would not be appropriate to continue the family dispute resolution.

Note: When an applicant files one of these certificates under subsection (7), the court may take the kind of certificate into account in considering whether to make an order referring to parties to family dispute resolution (see section 13C) and in determining whether to award costs against a party (see section 117).

Exception

(9) Subsection (7) does not apply to an application for a Part VII order in relation to a child if:

(a) the applicant is applying for the order:
   (i) to be made with the consent of all the parties to the proceedings; or
   (ii) in response to an application that another party to the proceedings has made for a Part VII order; or

(b) the court is satisfied that there are reasonable grounds to believe that:
   (i) there has been abuse of the child by one of the parties to the proceedings; or
   (ii) there would be a risk of abuse of the child if there were to be a delay in applying for the order; or
   (iii) there has been family violence by one of the parties to the proceedings; or
   (iv) there is a risk of family violence by one of the parties to the proceedings; or

(c) all the following conditions are satisfied:
   (i) the application is made in relation to a particular issue;
   (ii) a Part VII order has been made in relation to that issue within the period of 12 months before the application is made;
   (iii) the application is made in relation to a contravention of the order by a person;
(iv) the court is satisfied that there are reasonable grounds to believe that
the person has behaved in a way that shows a serious disregard for
his or her obligations under the order; or
(d) the application is made in circumstances of urgency; or
(e) one or more of the parties to the proceedings is unable to participate
effectively in family dispute resolution (whether because of an incapacity
of some kind, physical remoteness from dispute resolution services or for
some other reason); or
(f) other circumstances specified in the regulations are satisfied.

Referral to family dispute resolution when exception applies

(10) If:
(a) a person applies for a Part VII order; and
(b) the person does not, before applying for the order, attend family dispute
resolution with a family dispute resolution practitioner and the other party
or parties to the proceedings in relation to the issue or issues that the order
would deal with; and
(c) subsection (7) does not apply to the application because of subsection (9);
the court must consider making an order that the person attend family dispute
resolution with a family dispute resolution practitioner and the other party or
parties to the proceedings in relation to that issue or those issues.

(11) The validity of:
(a) proceedings on an application for a Part VII order; or
(b) any order made in those proceedings;
is not affected by a failure to comply with subsection (7) in relation to those
proceedings.

(12) In this section:

family dispute resolution provisions of the Family Law Rules 2004 means:
(a) Rule 1.05 of those Rules; and
(b) Part 2 of Schedule 1 to those Rules;
to the extent to which they deal with dispute resolution.

60J Family dispute resolution not attended because of child abuse or family
violence

(1) If:
(a) subsections 60I(7) to (12) apply to an application for a Part VII order (see
subsections 60I(5) and (6)); and
(b) subsection 60I(7) does not apply to the application because the court is
satisfied that there are reasonable grounds to believe that:
(i) there has been abuse of the child by one of the parties to the
proceedings; or
(ii) there has been family violence by one of the parties to the
proceedings;
a court must not hear the application unless the applicant has indicated in
writing that the applicant has received information from a family counsellor or
family dispute resolution practitioner about the services and options (including
alternatives to court action) available in circumstances of abuse or violence.
(2) Subsection (1) does not apply if the court is satisfied that there are reasonable grounds to believe that:

(a) there would be a risk of abuse of the child if there were to be a delay in applying for the order; or

(b) there is a risk of family violence by one of the parties to the proceedings.

(3) The validity of:

(a) proceedings on an application for a Part VII order; or

(b) any order made in those proceedings;

is not affected by a failure to comply with subsection (1) in relation to those proceedings.

(4) If:

(a) the applicant indicates in writing that the applicant has not received information about the services and options (including alternatives to court action) available in circumstances of abuse or violence; and

(b) subsection (2) does not apply;

the principal executive officer of the court concerned must ensure that the applicant is referred to a family counsellor or family dispute resolution practitioner in order to obtain information about those matters.

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**Division 2—Parental responsibility**

**61A What this Division does**

This Division deals with the concept of parental responsibility including, in particular:

(a) what parental responsibility is; and

(b) who has parental responsibility.

**61B Meaning of parental responsibility**

In this Part, *parental responsibility*, in relation to a child, means all the duties, powers, responsibilities and authority which, by law, parents have in relation to children.

**61C Each parent has parental responsibility (subject to court orders)**

(1) Each of the parents of a child who is not 18 has parental responsibility for the child.

Note 1: This section states the legal position that prevails in relation to parental responsibility to the extent to which it is not displaced by a parenting order made by the court. See subsection (3) of this section and subsection 61D(2) for the effect of a parenting order.

Note 2: This section does not establish a presumption to be applied by the court when making a parenting order. See section 61DA for the presumption that the court does apply when making a parenting order.

Note 3: Under section 63C, the parents of a child may make a parenting plan that deals with the allocation of parental responsibility for the child.
Subsection (1) has effect despite any changes in the nature of the relationships of the child’s parents. It is not affected, for example, by the parents becoming separated or by either or both of them marrying or re-marrying.

Subsection (1) has effect subject to any order of a court for the time being in force (whether or not made under this Act and whether made before or after the commencement of this section).

Note: Section 111CS may affect the attribution of parental responsibility for a child.

61D Parenting orders and parental responsibility

(1) A parenting order confers parental responsibility for a child on a person, but only to the extent to which the order confers on the person duties, powers, responsibilities or authority in relation to the child.

(2) A parenting order in relation to a child does not take away or diminish any aspect of the parental responsibility of any person for the child except to the extent (if any):
   (a) expressly provided for in the order; or
   (b) necessary to give effect to the order.

61DA Presumption of equal shared parental responsibility when making parenting orders

(1) When making a parenting order in relation to a child, the court must apply a presumption that it is in the best interests of the child for the child’s parents to have equal shared parental responsibility for the child.

Note: The presumption provided for in this subsection is a presumption that relates solely to the allocation of parental responsibility for a child as defined in section 61B. It does not provide for a presumption about the amount of time the child spends with each of the parents (this issue is dealt with in section 65DAA).

(2) The presumption does not apply if there are reasonable grounds to believe that a parent of the child (or a person who lives with a parent of the child) has engaged in:
   (a) abuse of the child or another child who, at the time, was a member of the parent’s family (or that other person’s family); or
   (b) family violence.

(3) When the court is making an interim order, the presumption applies unless the court considers that it would not be appropriate in the circumstances for the presumption to be applied when making that order.

(4) The presumption may be rebutted by evidence that satisfies the court that it would not be in the best interests of the child for the child’s parents to have equal shared parental responsibility for the child.

61DB Application of presumption of equal shared parental responsibility after interim parenting order made

If there is an interim parenting order in relation to a child, the court must, in making a final parenting order in relation to the child, disregard the allocation of parental responsibility made in the interim order.
61E Effect of adoption on parental responsibility

(1) This section applies if:
   (a) a child is adopted; and
   (b) immediately before the adoption, a person had parental responsibility for
       the child, whether in full or to a limited extent and whether because of
       section 61C or because of a parenting order.

(2) The person’s parental responsibility for the child ends on the adoption of the
    child, unless the adoption is by a prescribed adopting parent and leave was not
    granted under section 60G for the adoption proceedings to be commenced.

61F Application to Aboriginal or Torres Strait Islander children

In:
   (a) applying this Part to the circumstances of an Aboriginal or Torres Strait
       Islander child; or
   (b) identifying a person or persons who have exercised, or who may exercise,
       parental responsibility for such a child;

the court must have regard to any kinship obligations, and child-rearing
practices, of the child’s Aboriginal or Torres Strait Islander culture.

Division 3—Reports relating to children under 18

62A What this Division does

This Division deals with the preparation of reports for use in proceedings
relating to children who are under 18.

62B Court’s obligation to inform people to whom Part VII orders apply about
family counselling, family dispute resolution and other family
services

If a court makes an order in proceedings under this Part, the court must inform
the parties to the proceedings about the family counselling services, family
dispute resolution services and other courses, programs and services available
to help the parties adjust to the consequences of that order.

Note: Before informing the parties, the court must consider seeking the advice of a family
consultant about the services appropriate to the parties’ needs (see section 11E).

62G Reports by family consultants

(1) This section applies if, in proceedings under this Act, the care, welfare and
development of a child who is under 18 is relevant.

(2) The court may direct a family consultant to give the court a report on such
matters relevant to the proceedings as the court thinks desirable.

(3) If the court makes a direction under subsection (2), it may, if it thinks it
necessary, adjourn the proceedings until the report has been given to the court.

(3A) A family consultant who is directed to give the court a report on a matter under
subsection (2) must:
(a) ascertain the views of the child in relation to that matter; and
(b) include the views of the child on that matter in the report.

Note: A person cannot require a child to express his or her views in relation to any matter (see section 60CE).

(3B) Subsection (3A) does not apply if complying with that subsection would be inappropriate because of:
(a) the child’s age or maturity; or
(b) some other special circumstance.

(4) The family consultant may include in the report, in addition to the matters required to be included in it, any other matters that relate to the care, welfare or development of the child.

(5) For the purposes of the preparation of the report, the court may make any other orders, or give any other directions, that the court considers appropriate (including orders or directions that one or more parties to the proceedings attend, or arrange for the child to attend, an appointment or a series of appointments with a family consultant).

Note: Before making orders under this section, the court must consider seeking the advice of a family consultant about the services appropriate to the parties’ needs (see section 11E).

(6) If:
(a) a person fails to comply with an order or direction under subsection (5); or
(b) a child fails to attend an appointment with a family consultant as arranged in compliance with an order or direction under subsection (5);
the family consultant must report the failure to the court.

(7) On receiving a report under subsection (6), the court may give such further directions in relation to the preparation of the report as it considers appropriate.

(8) A report given to the court pursuant to a direction under subsection (2) may be received in evidence in any proceedings under this Act.

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**Division 4—Parenting plans**

**63A What this Division does**

This Division explains what parenting plans are.

**63B Parents encouraged to reach agreement**

The parents of a child are encouraged:
(a) to agree about matters concerning the child; and
(b) to take responsibility for their parenting arrangements and for resolving parental conflict; and
(c) to use the legal system as a last resort rather than a first resort; and
(d) to minimise the possibility of present and future conflict by using or reaching an agreement; and
(e) in reaching their agreement, to regard the best interests of the child as the paramount consideration.
Parents are encouraged to reach an informal agreement between themselves about matters concerning their children by entering into a parenting plan. Parents who seek enforceable arrangements require court orders. These can be obtained by consent.

63C Meaning of parenting plan and related terms

(1) A parenting plan is an agreement that:
   (a) is in writing; and
   (b) is or was made between the parents of a child; and
   (ba) is signed by the parents of the child; and
   (bb) is dated; and
   (c) deals with a matter or matters mentioned in subsection (2).

(1A) An agreement is not a parenting plan for the purposes of this Act unless it is made free from any threat, duress or coercion.

(2) A parenting plan may deal with one or more of the following:
   (a) the person or persons with whom a child is to live;
   (b) the time a child is to spend with another person or other persons;
   (c) the allocation of parental responsibility for a child;
   (d) if 2 or more persons are to share parental responsibility for a child—the form of consultations 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 process to be used for resolving disputes about the terms or operation of the plan;
   (h) the process to be used for changing the plan to take account of the changing needs or circumstances of the child or the parties to the plan;
   (i) any aspect of the care, welfare or development of the child or any other aspect of parental responsibility for a child.

Note: Paragraph (f)—if the Child Support (Assessment) Act 1989 applies, provisions in a parenting plan dealing with the maintenance of a child (as distinct from child support under that Act) are unenforceable and of no effect unless the provisions in the plan are a child support agreement (see section 63CAA and subsection 63G(5) of this Act).

(2A) The person referred to in subsection (2) may be, or the persons referred to in that subsection may include, either a parent of the child or a person other than the parent of the child (including a grandparent or other relative of the child).

(2B) Without limiting paragraph (2)(c), the plan may deal with the allocation of responsibility for making decisions about major long-term issues in relation to the child.

(2C) The communication referred to in paragraph (2)(e) includes (but is not limited to) communication by:
   (a) letter; and
   (b) telephone, email or any other electronic means.

(3) An agreement may be a parenting plan:
   (a) whether made before or after the commencement of this section; and
   (b) whether made inside or outside Australia; and
   (c) whether other persons as well as a child’s parents are also parties; and
(d) whether it deals with other matters as well as matters mentioned in subsection (2).

Note: One of the other matters with which a parenting plan may deal is child support (see section 63CAA).

(4) Provisions of a parenting plan that deal with matters other than the maintenance of a child are **child welfare provisions**.

(5) Provisions of a parenting plan that deal with the matter mentioned in paragraph (2)(f) are **child maintenance provisions**.

(6) A **registered parenting plan** is a parenting plan:
   (a) that was registered in a court under section 63E as in force at any time before the commencement of the *Family Law Amendment Act 2003*; and
   (b) that continued to be registered immediately before the commencement of the *Family Law Amendment Act 2003*.

### 63CAA Parenting plans may include child support provisions

(1) If a parenting plan includes provisions of a kind referred to in subsection 84(1) of the *Child Support (Assessment) Act 1989*, the provisions do not have effect for the purposes of this Act.

(2) Subsection (1) does not affect the operation of the provisions for any other purpose.

(3) Nothing in this Division is to be taken to prevent the same agreement being both a parenting plan under this Part and a child support agreement under Part 6 of the *Child Support (Assessment) Act 1989*.

### 63D Parenting plan may be varied or revoked by further written agreement

A parenting plan, other than a plan to which section 63DB applies, may be varied or revoked by agreement in writing between the parties to the plan.

### 63DA Obligations of advisers

(1A) The obligations of an adviser under this section are in addition to the adviser’s obligations under section 60D.

Note: Section 60D deals with an adviser’s obligations in relation to the best interests of the child.

(1) If an adviser gives advice or assistance to people in relation to parental responsibility for a child following the breakdown of the relationship between those people, the adviser must:
   (a) inform them that they could consider entering into a parenting plan in relation to the child; and
   (b) inform them about where they can get further assistance to develop a parenting plan and the content of the plan.

(2) If an adviser gives advice to people in connection with the making by those people of a parenting plan in relation to a child, the adviser must:
   (a) inform them that, if the child spending equal time with each of them is:
      (i) reasonably practicable; and
      (ii) in the best interests of the child;
   they could consider the option of an arrangement of that kind; and
(b) inform them that, if the child spending equal time with each of them is not reasonably practicable or is not in the best interests of the child but the child spending substantial and significant time with each of them is:
   (i) reasonably practicable; and
   (ii) in the best interests of the child;
   they could consider the option of an arrangement of that kind; and

(d) inform them of the matters that may be dealt with in a parenting plan in accordance with subsection 63C(2); and

(e) inform them that, if there is a parenting order in force in relation to the child, the order may (because of section 64D) include a provision that the order is subject to a parenting plan they enter into; and

(f) inform them about the desirability of including in the plan:
   (i) if they are to share parental responsibility for the child under the plan—provisions of the kind referred to in paragraph 63C(2)(d) (which deals with the form of consultations between the parties to the plan) as a way of avoiding future conflicts over, or misunderstandings about, the matters covered by that paragraph; and
   (ii) provisions of the kind referred to in paragraph 63C(2)(g) (which deals with the process for resolving disputes between the parties to the plan); and
   (iii) provisions of the kind referred to in paragraph 63C(2)(h) (which deals with the process for changing the plan to take account of the changing needs or circumstances of the child or the parties to the plan); and

(g) explain to them, in language they are likely to readily understand, the availability of programs to help people who experience difficulties in complying with a parenting plan; and

(h) inform them that section 65DAB requires the court to have regard to the terms of the most recent parenting plan in relation to the child when making a parenting order in relation to the child if it is in the best interests of the child to do so.

Note: Paragraphs (a) and (b) only require the adviser to inform the people that they could consider the option of the child spending equal time, or substantial and significant time, with each of them. The adviser may, but is not obliged to, advise them as to whether that option would be appropriate in their particular circumstances.

(3) For the purposes of paragraph (2)(b), a child will be taken to spend **substantial and significant time** with a parent only if:
   (a) the time the child spends with the parent includes both:
      (i) days that fall on weekends and holidays; and
      (ii) days that do not fall on weekends or holidays; and
   (b) the time the child spends with the parent allows the parent to be involved in:
      (i) the child’s daily routine; and
      (ii) occasions and events that are of particular significance to the child; and
   (c) the time the child spends with the parent allows the child to be involved in occasions and events that are of special significance to the parent.

(4) Subsection (3) does not limit the other matters to which regard may be had in determining whether the time a child spends with a parent would be substantial and significant.
In this section:

adviser means a person who is:
(a) a legal practitioner; or
(b) a family counsellor; or
(c) a family dispute resolution practitioner; or
(d) a family consultant.

63DB Registered parenting plans

Application of section

(1) This section applies to a registered parenting plan.

Saving of registered parenting plan

(2) A registered parenting plan continues in force until revoked in accordance with section 63E, or set aside, varied or discharged as referred to in section 63H.

No variation of registered parenting plan

(3) A registered parenting plan cannot be varied.

Revocation of registered parenting plan

(4) Subject to subsection (5), a registered parenting plan may be revoked by agreement in writing between the parties to the plan.

Registration of revocation required

(5) An agreement revoking a registered parenting plan:
(a) may, subject to the applicable Rules of Court, be registered, in a court having jurisdiction under this Part, under section 63E; and
(b) does not have effect to revoke the plan until it is so registered.

63E Registration of a revocation of a registered parenting plan

(1) This section applies to a registered parenting plan.

(2) To apply for registration of an agreement (revocation agreement) revoking a registered parenting plan:
(a) an application for registration of the revocation agreement must be lodged in accordance with the applicable Rules of Court; and
(b) the application must be accompanied by:
   (i) a copy of the revocation agreement; and
   (ii) the information required by the applicable Rules of Court; and
   (iii) a statement, in relation to each party, that is to the effect that the party has been provided with independent legal advice as to the meaning and effect of the revocation agreement and that is signed by the practitioner who provided that advice.

(3) The court may register the revocation agreement if it considers it appropriate to do so having regard to the best interests of the child to whom the agreement relates. In determining whether it is appropriate to register the revocation agreement, the court:
(a) must have regard to the information accompanying the application for registration; and
(b) may, but is not required to, have regard to all or any of the matters set out in subsections 60CC(2) and (3).

63F Child welfare provisions of registered parenting plans

Application of section

(1) This section applies to a registered parenting plan that contains child welfare provisions.

(2) The court may, by order, vary the child welfare provisions in the plan if it considers the variation is required in the best interests of a child.

(3) The child welfare provisions have effect, subject to subsections (5) and (6), as if they were provisions of a parenting order.

Note: Provisions of this Act relevant to the child welfare provisions having effect as provided in this subsection include:
(a) Subdivisions C, D and E of Division 6 of this Part (dealing with obligations created by parenting orders (other than child maintenance orders)); and
(b) Division 13A of this Part and Part XIII (dealing generally with enforcement of orders and sanctions for contravening orders); and
(c) subsection 65D(2) (providing for discharge, variation, suspension and revival of parenting orders other than child maintenance orders); and
(d) other provisions of this Act (including subsection 64B(6)) that refer to parenting orders.

(4) If provisions of the plan have effect under subsection (3) as a court order, a person who is a party to the plan is taken (for example, for the purposes of section 65Y) to be a party to the proceedings in which the order was made.

(5) Subsection (3) does not apply to the plan (whenever registered) to the extent (if at all) that the plan purports to determine that the child concerned is to live with a person who is not a parent of the child.

(6) Even though the plan is registered, the court, or another court having jurisdiction under this Part, must not enforce the child welfare provisions if it considers that to do so would be contrary to the best interests of a child.

Note: Sections 60CB to 60CG deal with how a court determines a child’s best interests.

63G Child maintenance provisions of registered parenting plans—where not enforceable as maintenance agreements

(1) This section applies if:
(a) a registered parenting plan contains child maintenance provisions; and
(b) the plan is not a maintenance agreement or, if it is a maintenance agreement, the child concerned is not a child of the relevant marriage.

(2) The child maintenance provisions have effect, subject to subsections (3), (4) and (5), as if they were a child maintenance order made by the court.

Note: Provisions of this Act relevant to the child maintenance provisions having effect as a child maintenance order include:
(a) Parts XIII and XIII A (dealing generally with enforcement of orders and sanctions for contravening orders); and
(b) section 66S (providing for discharge, variation, suspension and revival of child maintenance orders); and
(c) other provisions of this Act that refer to parenting orders, or to child maintenance orders.

(3) Unless the plan provides otherwise, the child maintenance provisions (other than provisions for the periodic payment of maintenance) continue to operate in spite of the death of a party to the plan and operate in favour of, and are binding on, the legal personal representative of that party.

(4) If the child maintenance provisions include provisions (the periodic provisions) for the periodic payment of maintenance:
   (a) the periodic provisions continue to operate, if the plan so provides, in spite of the death of a party to the plan who is liable to make the periodic payments, and are binding on the legal personal representative of that party; but
   (b) the periodic provisions do not continue to operate, in spite of anything in the plan, after the death of the person entitled to receive the periodic payments.

(5) The child maintenance provisions have no effect, and are not enforceable in any way, at any time when an application could properly be made under the Child Support (Assessment) Act 1989 by one of the parties to the plan for administrative assessment of child support (within the meaning of that Act) for the child concerned.

   Note: This subsection does not affect the operation of provisions of a parenting plan referred to in section 63CAA (child support matters).

(6) Subsection (5) has effect whether or not an application for administrative assessment of child support for the child has in fact been made by a party to the plan.

63H Court’s powers to set aside, discharge, vary, suspend or revive registered parenting plans

(1A) This section applies to a registered parenting plan.

(1) The court in which the plan was registered may set aside the plan, and its registration, if the court is satisfied:
   (a) that the concurrence of a party was obtained by fraud, duress or undue influence; or
   (b) that the parties want the plan set aside; or
   (c) that it is in the best interests of a child to set aside the plan.

(2) In proceedings under subsection (1), to the extent that they are proceedings on the ground mentioned in paragraph (1)(c), the best interests of the child concerned are the paramount consideration.

   Note: Sections 60CB to 60CG deal with how a court determines a child’s best interests.

(3) Other provisions of this Act under which provisions of the parenting plan may be set aside or otherwise affected are:
   (a) subsection 63F(2)—under that subsection a court may vary child welfare provisions in the plan; and
   (b) subsection 65D(2)—under that subsection a court may make a parenting order that discharges, varies, suspends or revives provisions of the plan that have effect as if they were a parenting order (other than a child maintenance order); and
(c) section 66S—under that section a court may discharge, vary, suspend or revive provisions of the plan that have effect as if they were a child maintenance order.

(4) Except as permitted by subsection (1) or by a provision mentioned in subsection (3), a court must not set aside, discharge, vary, suspend or revive the whole or a part of the parenting plan.

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Division 5—Parenting orders—what they are

64A What this Division does

This Division explains what parenting orders are.

64B Meaning of parenting order and related terms

(1) A parenting order is:
   (a) an order under this Part (including an order until further order) dealing with a matter mentioned in subsection (2); or
   (b) an order under this Part discharging, varying, suspending or reviving an order, or part of an order, described in paragraph (a).

However, a declaration or order under Subdivision E of Division 12 is not a parenting order.

(2) A parenting order may deal with one or more of the following:
   (a) the person or persons with whom a child is to live;
   (b) the time a child is to spend with another person or other persons;
   (c) the allocation of parental responsibility for a child;
   (d) if 2 or more persons are to share parental responsibility for a child—the form of consultations 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 a child.

The person referred to in this subsection may be, or the persons referred to in this subsection may include, either a parent of the child or a person other than the parent of the child (including a grandparent or other relative of the child).

Note: Paragraph (f)—a parenting order cannot deal with the maintenance of a child if the Child Support (Assessment) Act 1989 applies.
(3) Without limiting paragraph (2)(c), the order may deal with the allocation of responsibility for making decisions about major long-term issues in relation to the child.

(4) The communication referred to in paragraph (2)(e) includes (but is not limited to) communication by:
   (a) letter; and
   (b) telephone, email or any other electronic means.

(4A) Without limiting paragraphs (2)(g) and (h), the parenting order may provide that the parties to the proceedings must consult with a family dispute resolution practitioner to assist with:
   (a) resolving any dispute about the terms or operation of the order; or
   (b) reaching agreement about changes to be made to the order.

(5) To the extent (if at all) that a parenting order deals with the matter mentioned in paragraph (2)(f), the order is a **child maintenance order**.

(6) For the purposes of this Act:
   (a) a parenting order that provides that a child is to live with a person is made **in favour** of that person; and
   (b) a parenting order that provides that a child is to spend time with a person is made **in favour** of that person; and
   (c) a parenting order that provides that a child is to have communication with a person is made **in favour** of that person; and
   (d) a parenting order that:
      (i) allocates parental responsibility for a child to a person; or
      (ii) provides that a person is to share parental responsibility for a child with another person;
      is made **in favour** of that person.

(9) In this section:

   **this Act** includes:
   (a) the standard Rules of Court; and
   (b) the related Federal Circuit Court Rules.

### 64C Parenting orders may be made in favour of parents or other persons

A parenting order in relation to a child may be made in favour of a parent of the child or some other person.

### 64D Parenting orders subject to later parenting plans

(1) Subject to subsection (2), a parenting order in relation to a child is taken to include a provision that the order is subject to a parenting plan that is:
   (a) entered into subsequently by the child’s parents; and
   (b) agreed to, in writing, by any other person (other than the child) to whom the parenting order applies.

(2) The court may, in exceptional circumstances, include in a parenting order a provision that the parenting order, or a specified provision of the parenting order, may only be varied by a subsequent order of the court (and not by a parenting plan).
(3) Without limiting subsection (2), exceptional circumstances for the purposes of that subsection include the following:

(a) circumstances that give rise to a need to protect the child from physical or psychological harm from being subjected to, or exposed to, abuse, neglect or family violence;

(b) the existence of substantial evidence that one of the child’s parents is likely to seek to use coercion or duress to gain the agreement of the other parent to a parenting plan.

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**Division 6—Parenting orders other than child maintenance orders**

**Subdivision A—Introductory**

**65A** What this Division does

(1) This Division deals with:

(a) applying for and making parenting orders, other than child maintenance orders (Subdivision B); and

(b) the general obligations created by parenting orders, other than child maintenance orders (Subdivision C); and

(c) dealing with people who have been arrested (Subdivision D); and

(d) the obligations under parenting orders, other than child maintenance orders, relating to taking or sending children from Australia (Subdivision E).

Note: Paragraph (a)—section 60I provides that people with disputes about matters that may be dealt with in a Part VII order (which includes a parenting order) should generally make use of family dispute resolution before applying for the order.

(2) Measures designed to improve communication between separated parents and to educate parents about their respective responsibilities in relation to their children are contained in this Division (see section 65DA).

Note: Division 13A provides for the compliance regime for dealing with contraventions, and alleged contraventions, of parenting orders.

**65AA** Child’s best interests paramount consideration in making a parenting order

Section 60CA provides that in deciding whether to make a particular parenting order in relation to a child, a court must regard the best interests of the child as the paramount consideration.

**65B** Division does not apply to child maintenance orders

This Division does not apply to parenting orders to the extent that they consist of child maintenance orders. Child maintenance orders are dealt with in Division 7.

**Subdivision B—Applying for and making parenting orders**

**65C** Who may apply for a parenting order

A parenting order in relation to a child may be applied for by:
(a) either or both of the child’s parents; or
(b) the child; or
(ba) a grandparent of the child; or
(c) any other person concerned with the care, welfare or development of the child.

65D Court’s power to make parenting order

(1) In proceedings for a parenting order, the court may, subject to sections 61DA (presumption of equal shared parental responsibility when making parenting orders) and 65DAB (parenting plans) and this Division, make such parenting order as it thinks proper.

Note: Division 4 of Part XIIAA (International protection of children) may affect the jurisdiction of a court to make a parenting order.

(2) Without limiting the generality of subsection (1) and subject to section 61DA (presumption of equal shared parental responsibility when making parenting orders) and 65DAB (parenting plans) and this Division, a court may make a parenting order that discharges, varies, suspends or revives some or all of an earlier parenting order.

(3) If the application for the parenting order was made as a result of the adjournment under paragraph 70NEB(1)(c) of proceedings under Subdivision E of Division 13A of Part VII:
   (a) the court must hear and determine the application as soon as practicable; and
   (b) if the court makes a parenting order on the application, the court may, if it thinks it is appropriate to do so, dismiss the proceedings under that Subdivision.

Note: The applicant may apply to the Family Court or to the Federal Circuit Court of Australia for the application for the parenting order or for the proceedings under Subdivision E of Division 13A of Part VII, or both, to be transferred to the Federal Circuit Court of Australia or to the Family Court, as the case requires (see section 33B of this Act and section 39 of the Federal Circuit Court of Australia Act 1999).

65DAA Court to consider child spending equal time or substantial and significant time with each parent in certain circumstances

Equal time

(1) Subject to subsection (6), if a parenting order provides (or is to provide) that a child’s parents are to have equal shared parental responsibility for the child, the court must:
   (a) consider whether the child spending equal time with each of the parents would be in the best interests of the child; and
   (b) consider whether the child spending equal time with each of the parents is reasonably practicable; and
   (c) if it is, consider making an order to provide (or including a provision in the order) for the child to spend equal time with each of the parents.

Note 1: The effect of section 60CA is that in deciding whether to go on to make a parenting order for the child to spend equal time with each of the parents, the court will regard the best interests of the child as the paramount consideration.

Note 2: See subsection (5) for the factors the court takes into account in determining what is reasonably practicable.
Substantial and significant time

(2) Subject to subsection (6), if:

(a) a parenting order provides (or is to provide) that a child’s parents are to have equal shared parental responsibility for the child; and

(b) the court does not make an order (or include a provision in the order) for the child to spend equal time with each of the parents;

the court must:

(c) consider whether the child spending substantial and significant time with each of the parents would be in the best interests of the child; and

(d) consider whether the child spending substantial and significant time with each of the parents is reasonably practicable; and

(e) if it is, consider making an order to provide (or including a provision in the order) for the child to spend substantial and significant time with each of the parents.

Note 1: The effect of section 60CA is that in deciding whether to go on to make a parenting order for the child to spend substantial time with each of the parents, the court will regard the best interests of the child as the paramount consideration.

Note 2: See subsection (5) for the factors the court takes into account in determining what is reasonably practicable.

(3) For the purposes of subsection (2), a child will be taken to spend substantial and significant time with a parent only if:

(a) the time the child spends with the parent includes both:

   (i) days that fall on weekends and holidays; and

   (ii) days that do not fall on weekends or holidays; and

(b) the time the child spends with the parent allows the parent to be involved in:

   (i) the child’s daily routine; and

   (ii) occasions and events that are of particular significance to the child; and

(c) the time the child spends with the parent allows the child to be involved in occasions and events that are of special significance to the parent.

(4) Subsection (3) does not limit the other matters to which a court can have regard in determining whether the time a child spends with a parent would be substantial and significant.

Reasonable practicality

(5) In determining for the purposes of subsections (1) and (2) whether it is reasonably practicable for a child to spend equal time, or substantial and significant time, with each of the child’s parents, the court must have regard to:

(a) how far apart the parents live from each other; and

(b) the parents’ current and future capacity to implement an arrangement for the child spending equal time, or substantial and significant time, with each of the parents; and

(c) the parents’ current and future capacity to communicate with each other and resolve difficulties that might arise in implementing an arrangement of that kind; and

(d) the impact that an arrangement of that kind would have on the child; and

(e) such other matters as the court considers relevant.
Note: Paragraph (c) reference to future capacity—the court has power under section 13C to make orders for parties to attend family counselling or family dispute resolution or participate in courses, programs or services.

Consent orders

(6) If:
   (a) the court is considering whether to make a parenting order with the consent of all the parties to the proceedings; and
   (b) the order provides (or is to provide) that a child’s parents are to have equal shared parental responsibility for the child;

the court may, but is not required to, consider the matters referred to in paragraphs (1)(a) to (c) or (if applicable) the matters referred to in paragraphs (2)(c) to (e).

(7) To avoid doubt, subsection (6) does not affect the application of section 60CA in relation to a parenting order.

Note: Section 60CA requires the best interests of the child to be the paramount consideration in a decision whether to make a particular parenting order.

65DAB  Court to have regard to parenting plans

When making a parenting order in relation to a child, the court is to have regard to the terms of the most recent parenting plan (if any) that has been entered into between the child’s parents (to the extent to which that plan relates to the child) if doing so would be in the best interests of the child.

65DAC  Effect of parenting order that provides for shared parental responsibility

(1) This section applies if, under a parenting order:
   (a) 2 or more persons are to share parental responsibility for a child; and
   (b) the exercise of that parental responsibility involves making a decision about a major long-term issue in relation to the child.

(2) The order is taken to require the decision to be made jointly by those persons.

Note: Subject to any court orders, decisions about issues that are not major long-term issues are made by the person with whom the child is spending time without a need to consult the other person (see section 65DAE).

(3) The order is taken to require each of those persons:
   (a) to consult the other person in relation to the decision to be made about that issue; and
   (b) to make a genuine effort to come to a joint decision about that issue.

(4) To avoid doubt, this section does not require any other person to establish, before acting on a decision about the child communicated by one of those persons, that the decision has been made jointly.

65DAE  No need to consult on issues that are not major long-term issues

(1) If a child is spending time with a person at a particular time under a parenting order, the order is taken not to require the person to consult a person who:
   (a) has parental responsibility for the child; or
   (b) shares parental responsibility for the child with another person;
about decisions that are made in relation to the child during that time on issues that are not major-long term issues.

Note: This will mean that the person with whom the child is spending time will usually not need to consult on decisions about such things as what the child eats or wears because these are usually not major long-term issues.

(2) Subsection (1) applies subject to any provision to the contrary made by a parenting order.

65DA Parenting orders

(1) This section applies when a court makes a parenting order.

(2) It is the duty of the court to include in the order particulars of:
   (a) the obligations that the order creates; and
   (b) the consequences that may follow if a person contravenes the order.

(3) If any of the persons to whom the order is directed is not represented by a legal practitioner, it is also the duty of the court to explain to the person, or to each of the persons:
   (a) the availability of programs to help people to understand their responsibilities under parenting orders; and
   (b) the availability and use of location and recovery orders to ensure that parenting orders are complied with.

(4) The court may cause to be prepared, and given to persons to whom a parenting order is directed, a document setting out particulars of the matters mentioned in paragraphs (3)(a) and (b).

(5) If a person to whom the order is directed is represented by a legal practitioner, the court may request the practitioner:
   (a) to assist in explaining to the person the matters mentioned in paragraphs (2)(a) and (b); and
   (b) to explain to the person the matters mentioned in paragraphs (3)(a) and (b).

(6) If a request is made by the court to a legal practitioner under paragraph (5)(a) or (b), it is the duty of the practitioner to comply with the request.

(7) Failure to comply with a requirement of, or with a request made under, this section does not affect the validity of a parenting order.

(8) Any matter that is required by this section to be included in a parenting order or any explanation that is required by this section to be given to a person is to be expressed in language that is likely to be readily understood by the person to whom the order is directed or the explanation is given.

65F General requirements for counselling before parenting order made

(2) Subject to subsection (3), a court must not make a parenting order in relation to a child unless:
   (a) the parties to the proceedings have attended family counselling to discuss the matter to which the proceedings relate; or
   (b) the court is satisfied that there is an urgent need for the parenting order, or there is some other special circumstance (such as family violence), that makes it appropriate to make the order even though the parties to the
(1) Subsection (2) does not apply to the making of a parenting order if:
(a) it is made with the consent of all the parties to the proceedings; or
(b) it is an order until further order.

(4) In this section:

proceedings for a parenting order includes:
(a) proceedings for the enforcement of a parenting order; and
(b) any other proceedings in which a contravention of a parenting order is alleged.

65G Special conditions for making parenting order about whom a child lives with or the allocation of parental responsibility by consent in favour of non-parent

(1) This section applies if:
(a) a court proposes to make a parenting order that deals with whom a child is to live with; and
(b) under the order, the child would not live with a parent, grandparent or other relative of the child; and
(c) the court proposes to make that order with the consent of all the parties to the proceedings.

(1A) This section also applies if:
(a) a court proposes to make a parenting order that deals with the allocation of parental responsibility for a child; and
(b) under the order, no parent, grandparent or other relative of the child would be allocated parental responsibility for the child; and
(c) the court proposes to make that order with the consent of all the parties to the proceedings.

(2) The court must not make the proposed order unless:
(a) the parties to the proceedings have attended a conference with a family consultant to discuss the matter to be determined by the proposed order; or
(b) the court is satisfied that there are circumstances that make it appropriate to make the proposed order even though the conditions in paragraph (a) are not satisfied.

65H Children who are 18 or over or who have married or entered de facto relationships

(1) A parenting order must not be made in relation to a child who:
(a) is 18 or over; or
(b) is or has been married; or
(c) is in a de facto relationship.

(2) A parenting order in relation to a child stops being in force if the child turns 18, marries or enters into a de facto relationship.
(3) A court having jurisdiction under this Part may make a declaration to the effect that the child is in, or has entered into, a de facto relationship.

(4) A declaration under subsection (3) has effect for the purposes of this Act but does not have effect for any other purpose (including, for example, other laws of the Commonwealth or laws of the States and Territories).

65J Effect of adoption on parenting order

(1) This section applies if:
   (a) a child is adopted; and
   (b) immediately before the adoption, a parenting order was in force in relation to the child.

(2) The parenting order stops being in force on the adoption of the child, unless the adoption is by a prescribed adopting parent and leave was not granted under section 60G for the adoption proceedings to be commenced.

65K What happens when parenting order that deals with whom a child lives with does not make provision in relation to death of parent with whom child lives

(1) This section applies if:
   (a) a parenting order is in force that provides that a child is to live with one of the child’s parents; and
   (b) that parent dies; and
   (c) the parenting order does not provide for what is to happen on that parent’s death.

(2) The surviving parent cannot require the child to live with him or her.

(3) The surviving parent, or another person (subject to section 65C), may apply for a parenting order that deals with the person or persons with whom the child is to live.

(4) In an application under subsection (3) by a person who does not, at the time of the application, have any parental responsibility for the child, any person who, at that time, has any parental responsibility for the child is entitled to be a party to the proceedings.

65L Family consultants may be required to supervise or assist compliance with parenting orders

(1) If a court makes a parenting order in relation to a child, the court may also, subject to subsection (2), make either or both of the following orders:
   (a) an order requiring compliance with the parenting order, as far as practicable, to be supervised by a family consultant;
   (b) an order requiring a family consultant to give any party to the parenting order such assistance as is reasonably requested by that party in relation to compliance with, and the carrying out of, the parenting order.

(2) In deciding whether to make a particular order under subsection (1) in relation to a child, a court must regard the best interests of the child as the paramount consideration.

Note: Sections 60CB to 60CG deal with how a court determines a child’s best interests.
65LA Court may order attendance at a post-separation parenting program

(1) In proceedings for a parenting order, the court may make an order directing a party to the proceedings to attend a post-separation parenting program.

Note: Before making an order under this section, the court must consider seeking the advice of a family consultant about the services appropriate to the party’s needs (see section 11E).

(2) In deciding whether to make a particular order under subsection (1), a court must regard the best interests of the child as the paramount consideration.

Note: Sections 60CB to 60CG deal with how a court determines a child’s best interests.

(3) In this section:

proceedings for a parenting order includes:

(a) proceedings for the enforcement of a parenting order; and
(b) any other proceedings in which a contravention of a parenting order is alleged.

65LB Conditions for providers of post-separation parenting programs

(1) An organisation meets the conditions in this section if:

(a) it is a recipient organisation (see subsection (2)); or
(b) there is a recipient organisation in relation to the organisation (see subsection (3)).

(2) An organisation is a recipient organisation for the purposes of paragraph (1)(a) if it receives, or has been approved to receive, funding under a program or a part of a program designated by the Minister under subsection (4) in order to provide services that include post-separation parenting programs.

(3) An organisation is a recipient organisation in relation to another organisation for the purposes of paragraph (1)(b) if:

(a) both:

(i) the other organisation is a member of the organisation; and
(ii) the organisation receives, or has been approved to receive, funding under a program or a part of a program designated by the Minister under subsection (4) in order that the organisation’s members may provide services that include post-separation parenting programs; or

(b) both:

(i) the organisation acts on behalf of a group of organisations that includes the other organisation; and
(ii) the organisation receives, or has been approved to receive, funding under a program or a part of a program designated by the Minister under subsection (4) in order that the organisations on whose behalf it acts may provide services that include post-separation parenting programs.

(4) The Minister may, in writing, designate for the purposes of this section:

(a) a program; or
(b) part of a program;
administered by or on behalf of the Commonwealth Government under which money appropriated by the Parliament is provided to organisations for the purposes of making post-separation parenting programs available.
(5) An instrument under this section is not a legislative instrument.

Subdivision C—General obligations created by certain parenting orders

65M General obligations created by parenting order that deals with whom a child lives with

(1) This section applies to a parenting order that is in force in relation to a child to the extent to which the order deals with whom the child is to live with.

(2) A person must not, contrary to the order:
   (a) remove the child from the care of a person; or
   (b) refuse or fail to deliver or return the child to a person; or
   (c) interfere with the exercise or performance of any of the powers, duties or responsibilities that a person has under the order.

65N General obligations created by parenting order that deals with whom a child spends time with

(1) This section applies to a parenting order that is in force in relation to a child to the extent to which the order deals with whom the child is to spend time with.

(2) A person must not:
   (a) hinder or prevent a person and the child from spending time together in accordance with the order; or
   (b) interfere with a person and the child benefiting from spending time with each other under the order.

65NA General obligations created by parenting order that deals with whom a child communicates with

(1) This section applies to a parenting order that is in force in relation to a child to the extent to which the order deals with whom the child is to communicate with.

(2) A person must not:
   (a) hinder or prevent a person and the child from communicating with each other in accordance with the order; or
   (b) interfere with the communication that a person and the child are supposed to have with each other under the order.

65P General obligations created by parenting order that allocates parental responsibility

(1) This section applies to a parenting order that is in force in relation to a child to the extent to which the order allocates parental responsibility for the child to a person (the carer).

(2) A person must not hinder the carer in, or prevent the carer from, discharging that responsibility.

65Q Court may issue warrant for arrest of alleged offender

(1) This section applies if:
   (a) a parenting order provides that:
      (i) a child is to live with a person; or
(ii) a child is to spend time with a person; or
(iii) a child is to communicate with a person; and

(b) a court having jurisdiction under this Part is satisfied, on application by
the person referred to in paragraph (1)(a), that there are reasonable
grounds for believing that a person (the **alleged offender**) has contravened
section 65M, 65N or 65NA in relation to the order; and

(c) there is an application before the court for the alleged offender to be dealt
with under Division 13A for the alleged contravention; and

(d) the court is satisfied that the issue of a warrant is necessary to ensure that
the alleged offender will attend before a court to be dealt with under
Division 13A for the alleged contravention.

(2) The court may issue a warrant authorising a person to whom it is addressed to
arrest the alleged offender.

(3) A warrant stops being in force:
   (a) if a date not later than 6 months after the issue of the warrant is specified
       in the warrant as the date when it stops being in force—on that date; or
   (b) otherwise—6 months after the issue of the warrant.

**Subdivision D—Dealing with people who have been arrested**

**65R Situation to which Subdivision applies**

This Subdivision applies if a person:
   (a) is arrested under a warrant issued under subsection 65Q(2); or
   (b) is arrested without warrant under a recovery order.

**65S Arrested person to be brought before a court**

(1) The arresting person must:
   (a) ensure that the alleged offender is brought before a court having
       jurisdiction under this Part before the end of the holding period applicable
       under subsection (4); and
   (b) take all reasonable steps to ensure that, before the alleged offender is
       brought before a court, the person who applied for the warrant or recovery
       order is aware:
           (i) that the alleged offender has been arrested; and
           (ii) of the court before which the alleged offender is to be brought.

(2) The alleged offender must not be released before the end of the holding period
except under an order of a court having jurisdiction under this Part.

(3) This section does not authorise the holding in custody of the alleged offender
after the end of the holding period.

(4) The **holding period** is:
   (a) if a Saturday, Sunday or public holiday starts within 24 hours after the
       arrest of the alleged offender—the longer of the following periods:
           (i) the period starting with the arrest and ending 48 hours later;
           (ii) the period starting with the arrest and ending at the end of the next
day after the day of the arrest that is not a Saturday, Sunday or public
       holiday; or
(b) in any other case—the period starting with the arrest and ending 24 hours later.

65T  Obligation of court—where application before it to deal with contravention

(1) This section applies if:
   (a) the alleged offender is brought before a court under section 65S; and
   (b) there is an application before the court for the alleged offender to be dealt with under Division 13A for the alleged contravention.

(2) The court must, without delay, proceed to hear and determine the application.

65U  Obligation of court—where no application before it, but application before another court, to deal with contravention

(1) This section applies if:
   (a) the alleged offender is brought before a court under section 65S; and
   (b) there is no application, or no longer any application, before the court for the alleged offender to be dealt with under Division 13A for the alleged contravention; and
   (c) the court is aware that there is an application before another court for the alleged offender to be dealt with under Division 13A for the alleged contravention.

(2) The court must, without delay:
   (a) order that the alleged offender is to be released from custody on his or her entering into a recognizance (with or without surety or security) that he or she will attend before the other court on a date, at a time and at a place specified by the court; or
   (b) order the arresting person to arrange for the alleged offender to be brought before the other court on such date and at such time as the court specifies, being a date and time such that the alleged offender is to be brought before the other court as soon as practicable, and in any event not more than 72 hours, after the order is made.

(3) If a court makes an order under paragraph (2)(b) for the alleged offender to be brought before another court:
   (a) subject to paragraph (c), the alleged offender may be kept in custody until he or she is brought before the other court; and
   (b) if the alleged offender is brought before the other court as required by the order, the other court must, without delay, proceed to hear and determine the application mentioned in paragraph (1)(c); and
   (c) if the alleged offender is not brought before the other court as required by the order, he or she must be released without delay.

65V  Obligation of court—where no application before any court to deal with contravention

(1) This section applies if:
   (a) the alleged offender is brought before a court under section 65S; and
   (b) there is no application, or no longer any application, before the court for the alleged offender to be dealt with under Division 13A for the alleged contravention; and
(c) so far as the court is aware, there is no application, or no longer any application, before any other court for the alleged offender to be dealt with under Division 13A for the alleged contravention.

(2) The court must, without delay, order the release of the alleged offender.

65W Applications heard as required by subsection 65T(2) or paragraph 65U(3)(b)

(1) If a court hearing an application as required by subsection 65T(2) or paragraph 65U(3)(b) adjourns the hearing, the court must:
   (a) order the alleged offender to be kept in such custody as the court considers appropriate during the adjournment; or
   (b) order that the alleged offender is to be released from custody, either on his or her entering into a recognizance (with or without surety or security) that he or she will attend before the court on the resumption of the hearing or otherwise.

(2) This section does not authorise the holding in custody of the alleged offender during an adjournment of proceedings that:
   (a) is expressed to be for a period of more than 24 hours; or
   (b) continues for more than 24 hours.

Subdivision E—Obligations under parenting orders relating to taking or sending children from Australia

65X Interpretation

(1) In this Subdivision:

   parenting order to which this Subdivision applies means a parenting order to the extent to which it provides, or would provide, that:
   (a) a child is to live with a person; or
   (b) a child is to spend time with a person; or
   (c) a child is to communicate with a person; or
   (d) a person is to have parental responsibility for a child.

(2) For the purposes of this Subdivision, if an appeal against a decision of a court in proceedings has been instituted and is pending, the proceedings are taken to be pending and sections 65Z and 65ZB (rather than sections 65Y and 65ZA) apply.

65Y Obligations if certain parenting orders have been made

(1) If a parenting order to which this Subdivision applies is in force, a person who was a party to the proceedings in which the order was made, or a person who is acting on behalf of, or at the request of, a party, must not take or send the child concerned from Australia to a place outside Australia except as permitted by subsection (2).

   Penalty: Imprisonment for 3 years.

   Note: The ancillary offence provisions of the Criminal Code, including section 11.1 (attempts), apply in relation to the offence created by subsection (1).
(2) Subsection (1) does not prohibit taking or sending the child from Australia to a place outside Australia if:

(a) it is done with the consent in writing (authenticated as prescribed) of each person in whose favour the order referred to in subsection (1) was made; or

(b) it is done in accordance with an order of a court made, under this Part or under a law of a State or Territory, at the time of, or after, the making of the order referred to in subsection (1).

Note: A defendant bears an evidential burden in relation to the matter in subsection (2) (see subsection 13.3(3) of the Criminal Code).

65Z Obligations if proceedings for the making of certain parenting orders are pending

(1) If proceedings (the Part VII proceedings) for the making of a parenting order to which this Subdivision applies are pending, a person who is a party to the proceedings, or who is acting on behalf of, or at the request of, a party, must not take or send the child concerned from Australia to a place outside Australia except as mentioned in subsection (2).

Penalty: Imprisonment for 3 years.

Note: The ancillary offence provisions of the Criminal Code, including section 11.1 (attempts), apply in relation to the offence created by subsection (1).

(2) Subsection (1) does not prohibit taking or sending the child from Australia to a place outside Australia if:

(a) it is done with the consent in writing (authenticated as prescribed) of each other party to the Part VII proceedings; or

(b) it is done in accordance with an order of a court made, under this Part or under a law of a State or Territory, after the institution of the Part VII proceedings.

Note: A defendant bears an evidential burden in relation to the matter in subsection (2) (see subsection 13.3(3) of the Criminal Code).

65ZA Obligations of owners etc. of aircraft and vessels if certain parenting orders made

(1) This section applies if:

(a) a parenting order to which this Subdivision applies is in force; and

(b) a person in whose favour the order was made has served on the captain, owner or charterer of an aircraft or vessel a statutory declaration made by the person not earlier than 7 days before the date of service that:

(i) relates to the order; and

(ii) complies with subsection (4).

(2) The person on whom the declaration is served must not permit the child identified in the declaration to leave a port or place in Australia in the aircraft or vessel for a destination outside Australia except as permitted by subsection (3).

Penalty: 60 penalty units.

(2A) Subsection (2) does not apply if the person has a reasonable excuse.

Note: A defendant bears an evidential burden in relation to the matter in subsection (2A) (see subsection 13.3(3) of the Criminal Code).
(3) Subsection (2) does not prohibit permitting the child to leave Australia in the aircraft or vessel if:
(a) the child leaves in the company, or with the consent in writing (authenticated as prescribed), of the person who made the statutory declaration; or
(b) the child leaves in accordance with an order of a court made, under this Part or under a law of a State or Territory, at the time of, or after, the making of the order.

Note: A defendant bears an evidential burden in relation to the matter in subsection (3) (see subsection 13.3(3) of the Criminal Code).

(4) The statutory declaration must contain:
(a) full particulars of the order, including:
   (i) the full name and the date of birth of the child to whom the order relates; and
   (ii) the full names of the parties to the proceedings in which the order was made; and
   (iii) the terms of the order; and
(b) such other matters (if any) as are prescribed.

65ZB Obligations of owners etc. of aircraft and vessels if proceedings for the making of certain parenting orders are pending

(1) This section applies if:
(a) proceedings (the Part VII proceedings) for the making of a parenting order to which this Subdivision applies are pending; and
(b) a party to the proceedings has served on the captain, owner or charterer of a vessel a statutory declaration made by the party not earlier than 7 days before the date of service that:
   (i) relates to the proceedings; and
   (ii) complies with subsection (4).

(2) The person on whom the declaration is served must not permit the child identified in the declaration to leave a port or place in Australia in the aircraft or vessel for a destination outside Australia except as permitted by subsection (3).

Penalty: 60 penalty units.

(2A) Subsection (2) does not apply if the person has a reasonable excuse.

Note: A defendant bears an evidential burden in relation to the matter in subsection (2A) (see subsection 13.3(3) of the Criminal Code).

(3) Subsection (2) does not prohibit permitting the child to leave Australia in the aircraft or vessel if:
(a) the child leaves in the company, or with the consent in writing (authenticated as prescribed), of the party who made the statutory declaration; or
(b) in accordance with an order of a court made, under this Part or under a law of a State or Territory, after the institution of the Part VII proceedings.

Note: A defendant bears an evidential burden in relation to the matter in subsection (3) (see subsection 13.3(3) of the Criminal Code).
(4) The statutory declaration must contain:
   (a) full particulars of the Part VII proceedings, including:
      (i) the full name and the date of birth of the child to whom the
          proceedings relate; and
      (ii) the full names of the parties to the proceedings; and
      (iii) the name of the court, the nature of the proceedings and the date of
          institution of the proceedings; and
      (iv) if an appeal has been instituted in the proceedings—the name of the
          court in which the appeal was instituted and the date on which it was
          instituted; and
   (b) a statement that the Part VII proceedings are pending at the date of the
       declaration; and
   (c) such other matters (if any) as are prescribed.

65ZC General provisions applicable to sections 65ZA and 65ZB

(1) A declaration under section 65ZA or 65ZB may be served on the owner or
    charterer of an aircraft or vessel, or on the agent of the owner of an aircraft or
    vessel, by sending the declaration by registered post addressed to the owner,
    charterer or agent at the principal place of business of the owner, charterer or
    agent.

(2) The captain, owner or charterer of an aircraft or vessel, or the agent of the
    owner of an aircraft or vessel, is not liable in any civil or criminal proceedings
    in respect of anything done in good faith for the purpose of complying with
    section 65ZA or 65ZB.

(3) If an act or omission by a person that constitutes an offence against
    subsection 65ZA(2) or 65ZB(2) is also an offence against any other law, the
    person may be prosecuted and convicted under that other law, but nothing in
    this subsection makes a person liable to be punished twice in respect of the
    same act or omission.

65ZD State or Territory laws stopping children leaving Australia not affected

Nothing in this Subdivision prevents or restricts the operation of any law of a
State or Territory under which:
(a) action may be taken to prevent a child from leaving Australia or being
    taken or sent outside Australia; or
(b) a person may be punished in respect of the taking or sending of a child
    outside Australia.
Bibliography


