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# The Perils and Pitfalls of Formal Equality in Australian Family Law Reform

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***Abstract***

*In this paper, we identify the influence of formal equality – and more specifically, formal gender equality (that is, treating men and women the same) – in central areas of major Australian family law reform over the past 20 years. Given the influence of formal equality and our concerns regarding this trend, we consider whether equality-based arguments should be abandoned entirely, at least in the family law context, and explore alternative approaches that could reframe the debate.*

## 1. Introduction

In May 2017, the Australian federal government announced a 'comprehensive review into the family law system' to be conducted by the Australian Law Reform Commission (ALRC),[1] with a final report due by 31 March 2019.[2] The terms of reference are wide, and include 'the underlying substantive rules and general legal principles in relation to parenting and property'.[3] When announcing the inquiry, the then Attorney-General, George Brandis, said it was 'the first comprehensive review into the family law system since the commencement of the Family Law Act in 1976'.[4] In reality, Australian post-separation parenting and child support law have been the subject of significant and ongoing reform focus and amendment since the 1990s. Property division has not been the subject of major law reform proposals since 1999[5] and continues to operate on the basis of a very broad judicial discretion to make orders that are 'just and equitable'.[6] Given this, proposals for major property reform would seem particularly likely now.

At a time when Australia is once again contemplating family law reform, we think there is significant value in revisiting past reform initiatives and patterns. Doing so offers a longer-term perspective regarding the evolution of our law, the interests at play in its amendment, and the impacts of amendment on vulnerable parties within the family law system – who are most commonly women and their dependent children, due to the greater likelihood that they will experience family violence and abuse, and post-separation economic

[1] George Brandis, 'Transforming the Family Law System', Media Release, 9 May 2018.
[2] George Brandis, 'Terms of Reference: Review of the Family Law System', 27 September 2017. An issues paper was released on March 2018: ALRC, *Review of the Family Law System*, Issues Paper 48 (2018).
[3] Brandis, above n 2.
[4] Brandis, above n 1.
[5] Commonwealth of Australia, *Property and Family Law: Options for Change. A Discussion Paper* (1999); Margaret Harrison, 'Matrimonial property reform' (1992) 31 *Family Matters* 18. Spousal maintenance law has not been the subject of reform proposals since the late 1980s: ALRC, *Report on Matrimonial Property,* Report No 39 (1987).
[6] Family Law Act 1975 (Cth) (FLA) s 79(2)/90SM(2). This is in contrast to a shift away from discretion towards rules in the areas of parenting and child support. Spousal maintenance law also operates on the basis of broad judicial discretion to make orders that are 'proper': FLA s 74(1)/90SE(1).

disadvantage.[7] Re-acquainting ourselves with what has happened in the past places us in a stronger position to formulate legislative change that will better protect their interests.

The premise for our paper is that formal equality – and more specifically, formal gender equality – has had significant influence in Australian family law changes over the past 20 years. Given this, and the broader political and social context, it is highly likely that the pull and influence of formal equality messages will continue to be evident. We see this prospect as troubling. Despite its apparent benefits of simplicity and fairness, we are concerned that formal equality has not served the interests of vulnerable women and their dependent children well in Australian family law reform. The significant challenge we face in the current policy and reform environment where formal equality ideology prevails is to identify alternative options that would more effectively address inequality.

After first defining our key terms, we identify the influence of formal equality in areas of major legislative family law reform over the past 20 years in Australia, namely: parenting, child support and pre-nuptial agreements (focusing in each instance on what happened, why, and its impact).[8] We then consider the role of formal equality in previous proposals for legislative change to family property law, and consider whether even in the absence of any legislative amendment there are indications that formal equality is having increasing influence in Australian family property law. Finally, given the influence of formal equality and our concerns regarding this trend, we consider whether equality-based arguments should be abandoned entirely, at least in the family law context, and explore alternative approaches that could reframe the debate.

We concede at the outset the limitations of our approach. Our paper focuses almost entirely on what Janet Halley and Kerry Rittich call 'Family Law 1' – the rules governing 'divorce, parental status, and parental rights and duties'.[9] To this we add rules governing financial arrangements between separating spouses and de facto partners, that is, rules on child support and property division, and maintenance.[10] In this paper we do not focus on the

[7] There is much research establishing these points. In Australia, recent examples include: Rae Kaspiew, Rachel Carson, Jessie Dunstan, Lixia Qu, Briony Horsfall, John De Maio et al., *Evaluation of the 2012 Family Violence Amendments: Synthesis Report* (AIFS, 2015); Lixia Qu, Ruth Weston, Lawrie Moloney. Rae Kaspiew and Jessie Dunstan, *Post-separation Parenting, Property and Relationship Dynamics after Five Years* (AIFS, 2014); Davis De Vaus, Matthew Gray, Lixia Qu and David Stanton, 'The Economic Consequences of Divorce in Australia' (2014) 28 *International Journal of Law, Policy and the Family* 26.

[8] While formal equality has underpinned strong encouragement of private agreement in other areas of Australian family law over the past two decades, including in the areas of parenting and child support, a broader discussion is beyond the scope of this paper.

[9] Janet Halley and Kerry Rittich, 'Critical Directions in Comparative Family Law: Genealogies and Contemporary Studies of Family Law Exceptionalism' (2010) 58 *The American Journal of Comparative Law* 753, 761.

[10] Maintenance is not a focus of our paper, as in Australia it has not been this subject of law and policy reform interest since the 1980s (above n 5), and research has found that its payment is 'rare, minimal and brief': Juliet Behrens and Bruce Smyth, *Spousal Support in Australia: A Study of Incidence and Attitudes* (Working Paper No 16, AIFS, 1999) 8. While our focus in this paper in on reform activity, lack of interest in – and payment of – maintenance is highly consistent with formal equality influences. Specifically, Behrens and Smyth's analysis (drawing on Australian Institute of Family Studies data involving telephone interviews conducted in late 1997 with a random national sample of 650 Australians who had divorced between 1987 and 1997) is the most recent comprehensive Australian research. They found spousal maintenance occurred in less than 7 per cent of divorces, typically lasted two years, and averaged about $128 per week (or $6,640 per annum). A further 10 per cent of respondents said they had paid or received spousal maintenance solely through a larger share of

wide-ranging laws that also directly affect families, for example taxation, social security and the like (referred to by Halley and Rittich as 'Family Law 2'), but not traditionally considered part of 'family law' – apart from the child support context, where 'Family Law 1' (as we define it) intersects closely with taxation and social security law. Nor is our focus on those laws which indirectly affect families, for example laws on unfair dismissal (Halley and Rittich's 'Family Law 3'), or what they refer to as 'Family Law 4': the norms that may influence Family Law 1, 2 and 3. While we consider such laws and norms to be of utmost significance, our focus in the present paper reflects the ambit of 'family law' as practised on a day-to-day basis in Australia, as taught in Australian university law courses, and that underpins the ALRC's current terms of reference.

Our attention is also firmly focused on heterosexual relationships and gender equality, or lack thereof, in those relationships. This is not meant to imply that attaining a (more) just outcome as between separating parties to a (heterosexual) relationship is going to solve all problems of, say, gendered patterns of parenting or the relative poverty of women. As Mary Jane Mossman pointed out many years ago in relation to Canadian child support laws focusing on 'deadbeat dads' – meaning those men who were not paying child support – draconian laws imposed on fathers after separation may not be the most effective way of addressing child poverty.[11] That is, how you frame the problem in part frames the solution. Wealth redistribution, for example, will not be achieved by merely focusing on wealth distribution, or indeed parenting, on the dissolution of a relationship. Also relevant are: (1) the conditional and contingent nature of financial obligations within families,[12] which are themselves likely to be influenced by formal equality messages[13] and (2) the reality that in separating families, there is commonly not enough wealth to go around, so that the state will need to play a role.[14] However, justice between the parties is both a legitimate and indeed important focus. This paper focuses on that, while trying to place that debate within a context that brings to the forefront the social context in which family law reform, in the narrow sense, has in recent years taken place and continues to take place; a social context heavily influenced not just by those laws, but the broader array of laws alluded to above.

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the assets at property division. Cf the Canadian Spousal Support Advisory Guidelines, developed in Canada by Carol Rogerson and Rollie Thompson with funding from the Canadian Department of Justice to try to make orders for spousal support more predictable and consistent: Department of Justice, Government of Canada, *Spousal Support Advisory Guidelines* (10 June 2018) <http://www.justice.gc.ca/eng/fl-df/spousal-epoux/ssag-ldfpae.html>.

[11] Mary Jane Mossman, 'Child Support or Support for Children? Re-Thinking "Public" and "Private" in Family Law' (1997) 46 *University of New Brunswick Law Journal* 63. And see also Ruth Buchanan, 'Deadbeat Dads in Global Perspective: A Comment on Mary Jane Mossman' (1997) 46 *University of New Brunswick Law Journal* 89.

[12] Bruce Smyth and Ruth Weston, 'A Snapshot of Contemporary Attitudes to Child Support' (Research Report No 13, AIFS, 2005). In the UK, see: Janet Finch, *Family Obligations and Social Change* (Polity Press, 1989); Janet Finch and Jennifer Mason, *Negotiating Family Responsibilities* (Tavistock Routledge, 1993); John Eekelaar, 'Uncovering Social Obligations: Family Law and the Responsible Citizen' in Mavis Maclean (ed), *Making Law for Families* (Hart Publishing, 2000); Gillian Douglas, *Obligation and Commitment in Family Law* (Hart Publishing, 2018). In the US, see Marilyn Coleman and Lawrence Ganong, 'Changing Families, Changing Responsibilities?' (2000) 80 *National Forum* 34; Lawrence Ganong and Marilyn Coleman, *Changing Families, Changing Responsibilities* (Erlbraum, 1999).

[13] The lower sense of obligation to financially support one's ex-partner than one's child is one example: see above n 10 and below section 3.2.

[14] Joanna Miles, 'Charman v Charman: Making Sense of Need, Compensation and Equal Sharing after Miller/McFarlane' (2008) *Child and Family Law Quarterly* 378.

## 2. The concept of 'equality'

> 'The concept of equality has been a key animating principle of modern feminism, and has been highly productive for feminist legal thought and feminist policies concerning law. Today however, given the failure to achieve material and psychic equality for women, feminists have come to challenge the usefulness of equality as a concept, a particular definition, or a basis for strategizing. … [E]quality projects have been challenged by, and remain a challenge for, feminism.'[15]

As Rosemary Hunter articulates, the concept of equality, while potentially productive, has also been increasingly seen by feminists as a complex concept which may ultimately offer limited utility in the pursuit of feminist claims, depending most obviously on the form of equality argued for and perhaps ultimately on fundamental limitations inherent in the concept itself.

Specifically, feminists have long distinguished between 'formal equality' (or 'rule equality': applying exactly the same rules to men and women), and 'substantive equality' (or 'result equality': recognising differences between men and women that justify the application of different rules to women to promote women's equality, aimed at creating a more 'level playing field').[16] These approaches, however, have also been increasingly challenged by feminists, for example as a dichotomy that misses the point that the standard for 'sameness' and 'difference' is a male standard.[17] Moreover, the very notion of 'equality' has been identified as so central to liberal thought that equality-based claims will inevitably involve buying into a framework that can provide at best limited assistance,[18] and leading some to conclude that in the end, law provides 'one (albeit limited) forum' for addressing disadvantage.[19]

While these debates underpin and inform our paper, there is little evidence of them in the broader Australian community, where formal equality messages have significant purchase, silencing, entrenching, and providing a distraction from the need to address significant

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[15] Rosemary Hunter, in Rosemary Hunter (ed) *Rethinking Equality Projects in Law* (Hart Publishing, 2008) Foreword.

[16] Reg Graycar and Jenny Morgan, 'Examining Understandings of Equality: One Step Forward, Two Steps Back?' (2004) 20 *Australian Feminist Law Journal* 23; Rosemary Hunter, 'Introduction: Feminism and Equality', in Rosemary Hunter (ed) *Rethinking Equality Projects in Law* (Hart Publishing, 2008) 1-10; Lisa Sarmas, 'A Step in the Wrong Direction: The Emergence of Gender 'Neutrality' in the Equitable Presumption of Advancement' (1994) 19 *Melbourne University Law Review* 758-67.

[17] Catharine A McKinnon, *Toward a Feminist Theory of the State* (Harvard University Press, 1989); Catharine A McKinnon, 'Substantive Equality: A Perspective' (2011) 96 *Minnesota Law Review* 1; Graycar and Morgan (2004), above n 16; Hunter (2008), above n 16, 1.

[18] Susan M Armstrong, 'Is Feminist Law Reform Flawed?: Abstentionists and Sceptics' (2004) 20 *Australian Feminist Law Journal* 43; Susan B Boyd, 'Is Equality Enough? Father's Rights and Women's Rights Advocacy' in in Rosemary Hunter (ed) *Rethinking Equality Projects in Law* (Hart Publishing, 2008) 59-79; Reg Graycar and Jenny Morgan, 'Law Reform: What's In It for Women?' (2005) 23(2) *Windsor Year Book* 393-492; Hunter, above n 16.

[19] Graycar and Morgan (2005), above n 18, 393.

issues that continue for women arising from gender discrimination and women's greater responsibilities as caregivers. This is evidenced by a gender pay gap that has continued to hover at between 15 and 18 per cent for the past two decades, and – relatedly – superannuation savings of women on retirement that are half those of men.[20] Specifically, while the overall full-time gender pay gap in 2017 was 15.3%, in some industries it is substantially lower (eg Public Administration and Safety and Other Services – 6.8 per cent) and others substantially higher (eg 26.1 per cent in Financial and Insurance Services).[21] The Australian government's Workplace Gender Equality Agency points out that the gendered pay gap is caused by a number of factors that play out differently in different industries. These include: bias and discrimination; the gendered segregation of the workforce, with women concentrated in industries that attract lower wages than male-dominated industries; women taking time out of the workforce for child bearing, which has a continuing impact on their career progression; women undertaking a disproportionate share of work in the home; and lack of flexible workplace practices.[22]

It is certainly the case that, compared to 30 years ago, many more women are now in the paid workforce: in 1981 43 per cent of women with dependent children were in the paid workforce (both full- and part-time); this had risen to 63 per cent by 2009.[23] However, Janeen Baxter and Belinda Hewitt suggest that, compared to the US, 'Australian men and women are more strongly tied to a traditional (male breadwinner, female homemaker) division of domestic labour that is both based on and determined by Australian women's disproportionate share of part-time employment'.[24] Furthermore, becoming a parent continues to have a much greater impact on women's workforce participation (and domestic work) than men's.[25] Consistent with this, the rate of men in two-parent families being stay-at-home fathers remains very low, standing at 4.6 per cent of two parent families in 2016.[26] This compares to 29 per cent of stay-at-home mothers in two-parent families.[27] In short, while there are clearly changes over the long term, gender inequality in the paid workforce, and in work in the home, remain significant.

Yet in the face of continuing evidence of women's social and economic disadvantage relative to men, some of which is outlined above, claims that women are equal are often and successfully used as a rationale for inaction or changes that increase the problem. Formal equality's influence thus seems clear. Indeed, a broader cultural context in which formal equality messages prevail is consistent with 'the spread of neoliberal policies since 1980'; these policies have 'come to regulate all we practise and believe: that competition is

[20] Australian Human Rights Commission, 'Face the Facts: Gender Equality 2018', <https://www.humanrights.gov.au/education/face-facts/face-facts-gender-equality>.
[21] Australian Government, Workplace Gender Equality Agency, *Australia's Gender Pay Gap Statistics* (February 2018).
[22] Ibid 2.
[23] Alan Hayes, Ruth Weston and Lixia Qu, *Australian Families Then and Now: 1980 to 2010* (AIFS, 2010).
[24] Janeen Baxter and Belinda Hewitt, 'Negotiating Domestic Labor: Women's Earnings and Housework Time in Australia' (2013) 19 *Feminist Economics* 29, 49.
[25] Australian Government, AIFS, 'Mothers Still Do the Lion's Share of Housework', Media Release, 9 May 2016; Australian Government, AIFS, 'Current Attitudes and Practices of Australian Parents' in *Dad and Partner Pay: Implications for policy-makers and practitioners* (CFCA Paper No 12, February 2013).
[26] Jennifer Baxter, *Stay at Home Fathers in Australia* (AIFS Research Report, April 2018) 3.1.
[27] Ibid.

the only legitimate organising principle for human activity', and enable 'a sickening rise in inequality'.[28] Against this backdrop, it is unsurprising that the concept of equality in Australian family law since 2004 has continued to operate, as Martha Fineman has observed of the US position, 'as formal in nature, filtered through a robust conception of autonomy or liberty to mean little more than a mandate for sameness of treatment'.[29] As Susan Boyd and Elizabeth Sheehy observe, 'This formal concept of equality meets the needs of men's rights activism'[30] – a point central to our paper.

It quickly becomes evident that challenging formal equality messages in the current policy environment, while necessary, will be difficult. In Part 4 we discuss whether framing the debate in terms other than through 'equality discourse' might prove more effective in meeting this challenge.

## 3. The concept of equality in Australian family law

In 2004, Reg Graycar and Jenny Morgan observed the 'persistence of an understanding of equality as merely formal equality - the notion that the way to achieve gender equality is to treat women and men in exactly the same way',[31] and drew on several examples including family law that 'demonstrate[d] the Australian commitment to formal equality and gender neutrality'.[32] The focus of our analysis in this section on major family law amendments from 2004 (that is, where Graycar and Morgan's analysis finished) to the present in the areas of parenting, child support and binding financial agreements[33] indicates an overall continuation and strengthening of the formal gender equality theme they identified, to the cost of women and their dependent children.

### 3.1 Parenting

While the FLA has remained on its face a gender-neutral legislative scheme,[34] 2006 parenting law and process amendments, although preserving the principle that 'the best

[28] Stephen Metcalf, 'Neoliberalism: The Idea that Swallowed the World', *The Guardian*, 18 August 2017, <https://www.theguardian.com/news/2017/aug/18/neoliberalism-the-idea-that-changed-the-world>. See also: George Monbiot, 'Neoliberalism – The Ideology at the Root of All Our Problems', *The Guardian*, 15 April 2016 <https://www.theguardian.com/books/2016/apr/15/neoliberalism-ideology-problem-george-monbiot>. In the (UK) family law context, see: Anne Barlow, Rosemary Hunter, Janet Smithson, and Jan Ewing, *Mapping Paths to Family Justice: Resolving Family Disputes in Neoliberal Times* (Palgrave, 2017).

[29] Martha Albertson Fineman, 'Authority, Autonomy and the Vulnerable Subject in Law and Politics' in Anna Grear and Martha Albertson Fineman, *Vulnerability* (Ashgate, 2013) 13.

[30] Susan B Boyd and Elizabeth Sheehy, 'Men's Groups: Challenging Feminism' (2016) 28 *Canadian Journal of Women and the Law* 5, 8.

[31] Graycar and Morgan (2004), above n 16, 23.

[32] Ibid 25.

[33] In the context of family violence reform in the UK, see Felicity Kaganas, 'Domestic Violence, Men's Groups and the Equivalence Argument' in Alison Diduck and Katherine O'Donovan, *Feminist Perspectives on Family Law* (Routledge Cavendish, 2006).

[34] The High Court emphasising in 1979 that no principle or presumption operated 'that a young child, especially a young female child, is best left in in the custody of her mother': *Gronow* [1979] HCA 63, [7]; (1979) 144 CLR 513, 526 (Mason and Wilson JJ), discussed in Graycar and Morgan (2004), above n 16.

interests of the child [are] the paramount consideration',[35] included a distinct shift away from an open-ended 'best interests' approach to a more directive approach that encourages shared parenting outcomes regarding both decision-making on major issues and time. This was done mainly through the introduction of a legislative presumption that equal shared parental responsibility is in the best interests of children,[36] and a linked requirement that if such orders are made, the court must consider ordering shared time.[37] The 'equality' messages that began in 1996 with the introduction of s 60B (see 3.1.1) thus became more clearly articulated. While gender-neutral on their face, the 2006 amendments have most clearly benefitted fathers who wish to be involved in their children's lives post-separation. This could be for reasons ranging from a genuine commitment to parenting to a desire to control their ex-partner.[38] Given their usually lesser involvement in the daily care of children in intact families,[39] shared parenting laws facilitate a greater parenting role for them than they commonly have while relationship are intact, without necessarily reducing mothers' parenting responsibilities[40] and reducing their capacity to move on (literally and figuratively) post-separation in a manner not experienced by fathers.[41]

### 3.1.1 What happened?: Formal equality's growing purchase in post-separation parenting law

The central emphasis of the 2006 amendments on equal sharing of parental roles after separation built on 1996 FLA amendments aimed at promoting continuing post-separation relationships between children and their fathers. This was achieved in 1996 by the introduction of objects and principles in a new section, s 60B, to guide the interpretation of FLA Part VII (Children), including the principle that, unless not in their best interests, children have 'the right to know and be cared for by both their parents'.[42] Notably, the 1996 amendments had been met with concern by feminist legal academics including Juliet Behrens,[43] who argued that in ignoring the empirical reality that men and women are differently situated socially and economically, the amendments reflected a formal equality approach that was likely to 'enhance existing inequality based on actual and gendered differences'.[44]

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[35] FLA s 60CA.
[36] FLA s 61DA: see 3.1.1.
[37] FLA s 65DAA: see 3.1.1.
[38] See, for example, Belinda Fehlberg, Christine Millward and Monica Campo, 'Post-Separation Parenting in 2009: An Empirical Snapshot' (2009) 23 *Australian Journal of Family Law* 247; Lesley Laing, *No Way to Live: Women's Experiences of Negotiating the Family Law System in the Context of Domestic Violence* (University of Sydney & Benevolent Society, 2010).
[39] See further: Belinda Fehlberg, Rae Kaspiew, Fiona Kelly, and Juliet Behrens, *Australian Family Law: The Contemporary Context* (OUP, 2015) 179-182.
[40] See, for example, Fehlberg et al (2009), above n 38, who (based on their study of 60 parents separating after Australia's 2006 shared parenting amendments (discussed at 3.1) concluded that: 'mothers usually remained the main managers and facilitators in relation to children's lives, even in our equal shared care cases' (263).
[41] See, for example, Zoe Rathus, 'Of "Hoods" and "Ships" and Citizens: The Contradictions Confronting Mothers in the New Post-Separation Family' (2010) 19 *Griffith Law Review* 472.
[42] FLA s 60B(2)(a). This aspect of s 60B has not changed since 2006.
[43] Juliet Behrens, 'Shared Parenting: Possibilities…and Realities' (1996) 21 *Alternative Law Journal* 213.
[44] Miranda Kaye and Julia Tolmie, 'Discoursing Dads: The Rhetorical Devices of the Fathers' Rights Groups' (1998) 22 *Melbourne University Law Review* 162.

Previous research has demonstrated that the 2006 amendments were largely a result of pressure brought to bear on the federal government by fathers' groups, who were disappointed that the 1996 amendments did not lead to the significant changes in post-separation care patterns that they had hoped for.[45] Indeed, a major study of the impact of the 1996 amendments found that subsequently, mothers continued 'to do the bulk of the caregiving work after separation'.[46] Yet there was also increasing judicial reluctance to refuse fathers contact with their children at the interim stage, including in cases involving allegations of family violence.[47] This was despite the 1996 amendments also reflecting increasing awareness of the relevance of family violence to family law decision-making.[48] Thus from early on, there were indications that 'equality' messages (evident in the introduction of s 60B, with its emphasis on 'both parents')[49] were overpowering the safety messages just mentioned.[50]

Previous research has also demonstrated that, reflecting their increasing frustration at the failure of the 1996 amendments to significantly shift parenting time outcomes, fathers' changing approaches to articulating their position sharpened in 2003-2005 to claims and proposals that drew more forcefully on the language of formal equality. This can be compared with earlier complaints focussing on gender bias and discrimination (from 1976 when the Family Court was established), followed by increasing emphasis on the ongoing desirability of father-child relationships and more vaguely expressed claims for 'joint custody' (in the 1990s).[51]

Reflecting this pressure, in 2006, 'equality' messages became expressly articulated in Part VII. Key changes included the introduction of s 61DA (presumption of **equal** shared parental responsibility, unless not applicable due to family violence or abuse or rebutted because not in the child's best interests) and s 65DAA (requiring courts proposing to make orders for

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[45] Helen Rhoades, 'Yearning for Law: Fathers' Groups and Family Law Reform in Australia' in Sheldon and Collier (eds), *Fathers' Rights Activism and Law Reform in Comparative Perspective* (Hart Publishing, 2006), 125. See also Anna Parker, *Shared Parenting and Experimental Family Law Reform: Section 65DAA of the Family Law Act 1975* (SJD Thesis, Monash University, 2015).

[46] Helen Rhoades, Reg Graycar and Margaret Harrison, *The Family Law Reform Act 1995: The First Three Years* (University of Sydney and Family Court of Australia, 2000) 1; Rhoades (2006), above n 45, 125.

[47] Rhoades et al (2000), above n 46, 5; Rae Kaspiew, 'Violence in Contested Children's Cases: An Empirical Exploration' (2005) 19 *Australian Journal of Family Law* 112; Rachel Carson, *Supervised Contact: A Study of Current Trends and Emerging Tensions since the Introduction of the Family Law Reform Act 1995 (Cth)* (PhD Thesis, The University of Melbourne, 2011).

[48] Eg through the introduction of a definition of 'family violence' (s 4), and amendment of the best interests checklist (then s 68F; now s 60CC) to require courts to consider the need to protect the child from physical or psychological harm caused by being subjected or exposed (directly or indirectly) to 'abuse, ill-treatment, violence or other behaviour' (then s 68F(2)(g)).

[49] Specifically, s 60B, as introduced in 1996, referred to several principles to inform the interpretation of Part VII, namely: the right of children to know and be cared by 'both of their parents', the right to spend regular time and communicate regularly with 'both of their parents' and that parents 'share' their parental duties and 'should agree' about the future parenting of their children.

[50] Above n 48.

[51] Reg Graycar, 'Equal Rights Versus Fathers' Rights: The Child Custody Debate in Australia' in Carol Smart and Selma Sevenhuijsen, Child Custody and the Politics of Gender (Routledge, 1989) p 158; Miranda Kaye and Julia Tolmie, 'Fathers' Rights Groups in Australia and Their Engagement with Issues in Family Law' (1998) 12 *Australian Journal of Family Law* 1; Miranda Kaye and Julia Tolmie (1998), above n 44; Rhoades (2006), above n 45, 125-6. See also Parker, above n 45.

equal shared parental responsibility to consider making orders for **equal** time, and failing that substantial and significant time, if to do so would be in the child's best interests and reasonably practicable) (our emphasis). Thus, while the law did not say that parents who separate must equally share the care of their children, there was strong encouragement to do so, in the form of complex legislation that emphasised equality above other outcomes. There was also the strong risk that parents would draw a simple meaning from the new legislation, to the effect that 'Equal shared parenting is the law', and that equality messages would overwhelm the limited safety messages introduced as part of the 2006 amendments, as just indicated.

### 3.1.2 Why?: Explaining formal equality's growing purchase in post-separation parenting law

While '[c]oncerns that the Family Court's distribution of children was biased against men were raised relatively early … the question of post-divorce parenting didn't really come to the boil until the mid-1990s.'[52] Why did formal equality come to have such significant purchase in this area at this time?

Researchers including Lawrie Moloney and Bruce Smyth have conceptualised key drivers of change to post-separation parenting law from the 1980s from a positive standpoint and consistent with a formal equality lens, emphasising women's increasing workforce participation and growing emphasis on the role of fathers as nurturers as encouraging more equal sharing of parenting.[53] Alternatively, '[i]t has been suggested that advocacy of joint custody is associated with a backlash against the apparent successes of the women's movement throughout the 1970s and 1980s'.[54] Rosemary Hunter conveys a more complex picture,[55] arguing that the key factor underpinning 'the development of a full-scale panic about children' from the late 1990s was economic change. These changes included economic restructuring, globalisation, privatisation, all undermining men's position as full-time breadwinners, at around the same time as the Child Support Program (CSP) was introduced in 1988-89. The CSP made it harder for fathers to avoid financially supporting their children after relationship separation, and was accompanied by 'a broader cultural shift in attitudes to children and parenting'. [56] That cultural shift resulted from a further range of factors including lower fertility rates, changing constructions of childhood, an increased interest in children's rights, and the development of more emotionally-laden relationships between parents and children. Against this backdrop, 'contemporary

[52] Rosemary Hunter, 'Decades of Panic' (2005) 10 *Griffith Review* 53.
[53] Lawrie Moloney, Ruth Weston and Alan Hayes, 'Key Social Issues in the Development of Australian Family Law Research and Its Impact on Policy and Practice' (2013) 19 *Journal of Family* Studies 110; Bruce Smyth, Richard Chisholm, Bryan Rodgers et al, 'Legislating for Shared-Time Parenting after Parental Separation: Insights from Australia?' (2014) 77 *Journal of Law and Contemporary Problems* 109.
[54] Reg Graycar (1989), above n 51, 171, citing Carol Smart, 'Feminism and Law: Some Problems of Analysis and Strategy' (1986) 14 *International Journal of the Sociology of Law* 419 and Selma Sevenhuijsen, 'Fatherhood and the Political Theory of Rights: Theoretical Perspectives of Feminism' (1986) 14 *International Journal of the Sociology of Law* 329.
[55] Hunter (2005), above n 52. See also Parker, above n 45.
[56] Hunter (2005), above n 52.

arguments – advocated by the men's movement among others – about the social problem of fatherlessness' more readily gained traction,[57] which continued into the 2000s.

### 3.1.3 Impact?: Formal equality messages have increased risk rather than adding value

While formal equality arguments prevailed in 2006, their practical impact proved problematic. Findings of a major evaluation by the Australian Institute of Family Studies (AIFS) of the 2006 amendments were of concern. They included that adjudicated orders for shared time (defined for the study as 35-65 per cent of nights with each parent) increased from 2 per cent pre-reform to 13 per cent post-reform.[58] This was concerning as adjudicated parenting cases commonly have features (including allegations of family violence and child abuse, and/or ongoing high parental conflict) that are not associated with workable shared time arrangements.[59] However, most parents sort out parenting without going to court. In this regard, AIFS found that shared time arrangements, although still rare in the broader separating community, were (unsurprisingly) more common after the 2006 amendments (around 16 per cent in 2006),[60] but had been gradually increasing before then. More troubling was the Institute's finding that after the 2006 amendments, shared parenting arrangements in the broader separating community were no less likely in cases involving safety concerns.[61] This was also concerning given AIFS research pre-2006 finding that shared parenting time was mainly utilised by co-operative parents and in positive circumstances.[62] AIFS and other research conducted after the amendments also found that complex legislation had led to professional and community misunderstanding that the law said, 'The starting point is shared time', making it more likely that mothers would feel obliged to agree to shared time in circumstances where this was not an appropriate arrangement and contributing to their non-disclosure of safety concerns.[63]

Indeed, the AIFS Evaluation, and a growing body of research regarding the prevalence of cases involving family violence and abuse concerns in the family law system and the system's inadequate response,[64] encouraged the conclusion that the 2006 amendment's formal equality messages were prevailing over amendments occurring at the same time and aimed at protecting children from family violence and abuse.[65] This was the case despite

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[57] Ibid. Writing in 2004 of similar shifts in England, Carol Smart emphasised the significance of Bob Geldof as a key figure, along with the use by the fathers' rights movement of 'more high profile tactics more akin to those used in Australia and New Zealand' in the push towards formal equality in post-separation parenting: Carol Smart, 'Equal Shares: Rights for Fathers or Recognition for Children' (2004) 24 *Critical Social Policy* 484, 484.
[58] Rae Kaspiew, Matthew Gray, Ruth Weston, Lawrie Moloney, Kelly Hand, and Lixia Qu and the Family Law Evaluation Team, *Evaluation of the 2006 Family Law Reforms* (AIFS, 2009), Table 6.4.
[59] Eg Bruce Smyth, Catherine Caruana and Anna Ferro, 'Fifty-fifty care', in Bruce Smyth (ed), *Parent-Child Contact and Post-Separation Parenting Arrangements* (Research report no. 9, AIFS, 2004) 17-30.
[60] Kaspiew et al (2009), above n 58, Table 6.1.
[61] Ibid 22.
[62] Smyth et al, above n 59.
[63] In particular, Kaspiew et al (2009), above n 58; Richard Chisholm, *Family Courts Violence Review* (Family Court of Australia: Sydney, 2009). On the position of mothers post-2006, see further: Zoe Rathus, above n 41.
[64] In particular, Family Law Council, *Improving Responses to Family Violence in the Family Law System: An Advice on the Intersection of Family Violence and Family Law Issues* (2009), Richard Chisholm (2010), above n 63.
[65] Including providing that the need to 'the need to protect the child from physical or psychological harm from being subjected to, or exposed to, abuse, neglect or family violence' is an object of Part VII (s 60B(2)(b)) and a

increasing awareness in Australia from the 1990s of the damaging impact on children of experiencing family violence and abuse – whether directly or indirectly.[66]

As a result, the federal Labor government amended the FLA again in 2012 to improve the family law system's identification and responses to family violence and child abuse (the 2012 amendments).[67] The amendments included making clear that protection of children from harm was to be accorded 'greater weight' than the promotion of on-going relationships between parents and children.[68]

However, the impact of the 2012 amendments appears to have been quite limited. Most recently, an AIFS Evaluation found that while awareness and disclosure of family violence had improved, 'courts remained concerned to ensure that, wherever possible, children's relationships with both parents were maintained after separation, except in cases where the evidence was unambiguously in favour of an outcome inconsistent with this approach'.[69] Family law professionals participating in the study were generally of the view that less 'adequate priority' was placed on 'protection from harm' than on the promotion of a 'meaningful relationship' between fathers and their children.[70]

In summary, Australia's experience of legislating in the post-separation parenting domain conveys the increasing influence of formal equality claims of fathers' groups over time, to the cost of children's and mother's safety, and in a manner that operates to minimise the significance of mothers' significantly greater role in caring for children before separation.[71] Despite legislative change, shared time arrangements in the broader separating community

'primary consideration' when determining what is in children's bests interests (s 60CC(2)(b)), and that the presumption of equal shared responsibility is not applicable where there are reasonable grounds to believe that a person has engaged in family violence or child abuse (s 61DA(2)).

[66] See further: Renata Alexander, 'Family Violence in Parenting Cases in Australia under the Family Law Act 1975 (Cth): The Journey So Far – Where are We Now and are We There Yet?' (2015) 29 *International Journal of Law, Policy and the Family* 313, 320-22. Anecdotal evidence suggests that as a result of this increasing knowledge, mothers with ex-partners who have perpetrated family violence and/or abuse receive mixed messages across the state-federal divide: they are expected to act protectively in the state child protection system, but to facilitate 'meaningful relationships' between their child(ren) and the father in the federal family law context.

[67] Family Law Amendment (Family Violence and Other Matters) Act 2011 (Cth).

[68] FLA s 60CC(2A). Other amendments included a new definition of family violence (s 4AB), extending the definition of child abuse to subjecting or exposing a child to family violence that leads to significant psychological harm for the child (s 4, 'abuse'), and amendments aimed at improving the information available to courts about family violence and abuse in the cases before them. See further: Alexander, above n 66.

[69] See further: Rae Kaspiew et al (2015), above n 58, p xi.

[70] See further: Kaspiew et al (2015), above n 7, p xii. See also Renata Alexander above n 66; Patricia Easteal and Dimian Gray, 'Risk of Harm to Children from Exposure to Family Violence: Looking at How It is Understood and Considered by the Judiciary' (2013) 27 *Australian Journal of Family Law* 59; Adiva Sifris and Anna Parker, 'Family Violence and Family Law: Where to Now?' (2014) 4 *Family Law Review* 3.

[71] See section 2, above. The research demonstrates incremental shifts in responsibility for family work, eg: Lyn Craig, Killian Mullan, Megan Blaxland, 'Parenthood, Policy and Work-Family
Time in Australia 1992-2006' (2010) 1/24 *Work, Employment and Society* 27. See also, relying on 2016 census data, ABS, *General Community Profile*, Cat No 2001.0 (2017), Table G20: Unpaid Domestic Work by Age by Sex. This shows, for instance, that 194,526 men between the ages of 25-64 did 30 hours or more unpaid work, compared to 1,030,228 women in the same age bracket.

remain unusual[72] and more generally, patterns of post-separation parenting remain stable, with most children in separated families spending most or all nights with their mother (almost 79 per cent in 2008[73] and 73 per cent in 2014[74]). The 'standard 80/20 package' for residence and contact that existed pre-2006 (involving living with mum and every second weekend and half the school holidays with dad) has 'shifted in favour of a more diverse range of parenting arrangements, generally involving more time with fathers than had previously been common, including more overnight time and more time during the school weeks',[75] but there is no indication that parental responsibilities are more equally shared as a result: 'mothers [have] usually remained the main managers and facilitators in relation to children's lives'.[76] This is not surprising, given that FLA amendments have not been accompanied by the significant changes in other areas (particularly the workplace) necessary to encourage a shift in existing gendered patterns of care.

### 3.2 Child support

Since the late 1980s, the payment of child support in Australia has been covered by a national scheme that applies to all children, regardless of parental relationship status. The introduction of a national approach was underpinned by recognition of the need to address the poverty of children in sole parent families, as well as the social security costs arising from this, by shifting at least some of the responsibility for the financial support of children from the state to fathers.[77]

Central to the national scheme is a formula for calculating the amount of child support payable. The original formula was informed by a substantive equality approach (discussed further below at 3.2.1), which has subsequently – under the weight of fathers' complaints – given way to an approach consistent with a formal equality approach, particularly following amendments between 2006-08 (see 3.2.1). Although child support obligations are gender neutral ('[t]he parents of a child have the primary duty to maintain the child'[78]), around 80 per cent of child support payers are fathers[79] due to most children still spending the majority of time with their mothers after parental relationship separation, and the usually

[72] The most recent research, based on new Child Support cases, suggests around 16.5 per cent in 2015: Bruce Smyth and Richard Chisholm, 'Shared-time Parenting after Separation in Australia: Precursors, Prevalence and Postreform Patterns' (2017) 55 *Family Court Review* 586, 593.
[73] Kaspiew et al (2009), above n 58, Table 6.1.
[74] Kaspiew et al (2015), above n 7, Figure 2.3.
[75] Parker, above n 45, 149.
[76] Fehlberg et al (2009), above n 38, 263. The authors observed, in relation to their qualitative analysis of interviews with 60 separated parents, that this was so 'even in our equal shared care cases': ibid.
[77] More broadly, child support raises complex legal and policy questions about allocation of responsibility for children's financial support after parental separation by the child's parents versus the state (through government payments to families, and thus ultimately taxpayers and the wider community). See, for example, in the UK, Sally Sheldon, 'Unwilling Fathers and Abortion: Terminating Men's Child Support Obligations?' (2003) 66 *Modern Law Review* 175, and in Canada, Judy Fudge, 'The Privatization of the Costs of Social Reproduction: Some Recent Charter Cases' (1989) *Canadian Journal of Women and the Law* 246, and Mossman, above n 11. That said, payment of child support can play an important role in alleviating post-separation poverty of women and their dependent children, see: Christine Skinner, Kay Cook and Sarah Sinclair, 'The Potential of Child Support to Reduce Lone Mother Poverty: Comparing Population Survey Data in Australia and the UK' (2017) 25 *Journal of Poverty and Social Justice* 79.
[78] Child Support (Assessment) Act 1989 (Cth) s 4(1).
[79] Qu et al (2014), above n 7, Executive Summary.

lower incomes of mothers compared to fathers.[80] A shift away from a substantive equality approach and toward a formal equality approach in this area would, logically, increase existing economic disadvantage of women and their dependent children - a concern explored in research post-2008, as discussed in the following analysis.

### 3.2.1 What happened?: Substantive equality gives way to formal equality

The original child support formula had the hallmarks of a substantive equality approach, particularly in its different treatment of fathers' and mothers' incomes. Significant features were its focus on the payer's (usually the father's) income, and the very basic amount (based on single sole pension rates) allowed for his self-support. In contrast, resident parents (usually mothers) could earn average weekly earnings (AWE) (meaning 'full-time adult average weekly total earnings') plus an additional amount for child care before their income was relevant in assessing child support. This was aimed at encouraging mothers' workforce participation, and at acknowledging their non-financial contributions to the care of their children and that they would be sharing their income with their children in any case.[81] Few mothers earned over this amount, so mothers' income was rarely relevant to the child support payable by fathers.

Subsequently, however, growing influence of formal equality messages was evident in the erosion in the 1990s and early 2000s of aspects of the original formula (for example, the removal in 1999 of the allowance for the additional amount for childcare and the use in child support calculations of a lower weekly earnings figure: 'all employees average weekly earnings' (EAWE)).[82] Generally, changes made after the establishment of the CSP responded to claims of fathers that they were paying too much, rather than to concerns of mothers regarding enforcement and collection of payments.[83] 2006-08, however, saw the most significant amendments to the CSP since its inception. The background to the amendments was the 2003 Report of the House of Representatives Standing Committee on Family and Community Affairs' Inquiry into Child Custody[84] ('the 2003 Inquiry') which included the recommendation of a detailed evaluation of the CSP by a Ministerial Taskforce established for that purpose. The Howard federal government's focus on the interests of fathers was clear from the Taskforce's terms of reference, which did not include compliance and enforcement (key issues for mothers). The Taskforce made detailed recommendations (extending to compliance and enforcement)[85] which were largely implemented by the Howard federal government.

Despite the Taskforce's willingness to address compliance and enforcement issues, Kay Cook and Kristin Natalier's analysis (focusing on the 2003 Inquiry, the subsequent 2005 Taskforce

[80] Ibid, Table 2.4: fathers' median personal income was $52,500 per annum, compared to $35,000 for mothers.
[81] Child Support Consultative Group, *Child Support: Formula for Australia* (Canberra: Australian Government Publishing Service, 1988).
[82] See further: Fehlberg et al (2015), above n 39, 160.
[83] Ibid 426.
[84] Commonwealth, House of Representatives, Standing Committee on Family and Community Affairs, *Every Picture Tells a Story: Report on the Inquiry into Child Custody Arrangements in the Event of Family Separation* (Australian Government Publishing Service, 2003).
[85] Ministerial Taskforce on Child Support, *In the Best Interests of Children — Reforming the Child Support Scheme* (Commonwealth of Australia, Attorney-General's Department, 2005).

Report and the resultant 2006-08 legislative amendments), demonstrated that the reform process and resulting amendments comprised a gendered framing of child support that focused primarily on men's financial autonomy and interests in relation to the state and their ex-partners and children.[86] In common with the 2006 parenting amendments, formal equality rhetoric was a strategy used by the Taskforce to justify recommendations that most clearly buoyed up the position of fathers:

> There is now a greatly increased emphasis on shared parental responsibility, and the importance of both parents remaining actively involved in their children's lives after separation has gained much greater recognition. Child support policy can no longer just be concerned with enforcing the financial obligations of reluctant non-resident parents. Ensuring the payment of child support is one part of a bigger picture of encouraging the continuing involvement of both parents in the upbringing of their children.
>
> There have also been other kinds of change that affect child support policy. Since the late 1980s, there has been a substantial increase in the workforce participation of mothers, particularly through part-time employment. Children in intact families tend to be supported from the incomes of both parents. The Government is refocussing its income support and work participation policies to treat both parents as potential labour force participants with the aims of improving family wellbeing over the longer term and reducing welfare dependence.[87]

This was notwithstanding evidence at the time that sole parent headed families remained among the poorest in the community.[88]

Central to the amendments was a new formula, which took effect from 1 July 2008. It reflects a formal equality approach by treating both parents as payers for the purposes of calculating child support liability. A main justification for this change was that most mothers in Australia are now in part time employment.[89] A formal equality approach was also reflected in the new formula's allocation of the same self-support amount to each parent.

The problem with the new formula's use of a formal equality-based model – as discussed earlier (Section 2) – is that Australian women's and men's patterns of workforce participation are not the same, due to women's significantly greater carer responsibilities. While women shape their work commitments around family commitments to a much greater extent than men,[90] the emphasis in the formula is on calculating the amount of money spent on children. This is a structural bias as it does not factor in non-cash

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[86] Kay Cook and Kristin Natalier, 'The Gendered Framing of Australia's Child Support Reforms' (2013) 27 *International Journal of Law Policy and the Family* 28.

[87] Ministerial Taskforce (2005), above n 85, Summary Report, 1.

[88] Australian Senate Community Affairs Committee, *Report on the Child Support Legislation Amendment (Reform of the Child Support Scheme — New Formula and Other Measures) Bill 2006 (Cth)*, (Senate Community Affairs Secretariat, 2006).

[89] Ministerial Taskforce (2005), above n 85, 2.

[90] See also Michele Haynes, Lachlan Heybroek, Belinda Hewitt and Janeen Baxter, *Parenthood and Employment Outcomes: The Effect of a Birth Transition on Men's and Women's Employment Hours,* paper prepared for the HILDA Survey Research Conference, Melbourne, 3-4 October 2013. In New Zealand, see: Isabelle Sin, Kabir Dasgupta and Gail Pacheco, *Parenthood and Labour Market Outcomes*, Report commissioned by the Ministry for Women, New Zealand (May 2018).

contributions and opportunity costs typically paid by mothers. The formula just looks at the amount of money each parent earns and the costs of raising a child/children in a family with that combined income. Yet mothers with children living with them for the majority of time are likely to be contributing far more than their income represents, will in any case be sharing their income with the children, and are likely to face particular challenges when they are in paid employment including meeting childcare costs. A question also surrounds the extent to which the financial costs of children are in fact shared between parents when children have regular overnight stays with a minority time parent, given that mothers appear likely to remain 'the main managers and facilitators in relations to their children's lives' after parents separate.[91] The original formula had recognized these factors by allowing mothers to earn AWE plus an additional amount for the costs of childcare before their income was taken into account to reduce the father's child support obligation, and not reducing the father's child support obligations unless he had the children living with him for at least 40 per cent of the time.[92]

### 3.2.2 Why?: Explaining formal equality's growing purchase in child support law

Substantive equality's initial influence and formal equality's growing purchase in child support law was to some extent a reflection of the senior people involved at each point in time. The original child support formula reflected the strong social justice commitment of several key players, in particular, the Labor Minister for Social Security, Brian Howe, the Family Law Council (then chaired by John Fogarty, a senior appeal judge of the Family Court with a strong commitment to child maintenance reform), and the Australian Council of Social Service. While cost-saving to the federal government remained of practical relevance, the government's main policy aim was increasingly to address the economic disadvantage experienced by sole carers and their children.[93] The emphasis was epitomised by Australian Prime Minister Bob Hawke's election pledge in 1987 that no child would live in poverty by 1990.[94] These influences were no longer in place by 2005, when the Howard federal government was in office and the Ministerial Taskforce completed its report. Rather, the Taskforce's report assumed that the formal equality messages underpinning the 2006 shared parenting amendments should be reflected in the child support context, and took the view, without reference to evidence in support of its claim, that mothers' economic disadvantage after relationship breakdown had been greatly alleviated since the 1980s by their increasing part time employment, both during[95] and after relationships end.[96]

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[91] Fehlberg et al (2009), above n 38, 263. See also Section 3.1.3.

[92] Child Support Consultative Group, *Child Support: Formula for Australia. A Report from the Child Support Consultative Group* (AGPS, 1988).

[93] Meredith Edwards, Cosmo Howard and Robin Miller, *Social Policy, Public Policy: From Problem to Practice* (Allen & Unwin, 2001) 59.

[94] Some of the flavour of the progressive social policy context at the time is conveyed by chapter headings, and indeed the book title, of this publication from 1983: Cora Baldock and Bettina Cass, *Women, Social Welfare and the State*, Allen and Unwin, North Sydney, 1993. The chapters included 'Public Policies and the Paid Work of Women'; 'Redistribution to Children and to Mothers; a History of Child Endowment and Family Allowances'; 'Women as Welfare Recipients: Women, Poverty and the State'. The role of the state in alleviating poverty is palpable, and palpably missing in 2018.

[95] See Section 2. See further: Jennifer Baxter, 'Families Working Together: Getting the Balance Right', *Australian Family Trends*, No 2 (AIFS, May 2013).

[96] De Vaus et al, above n 7.

It is also important to appreciate that differential treatment of mothers and fathers had been a consistent complaint of fathers from the outset, as longstanding complainants to their local members of parliament and to the several reviews of the child support scheme pre-2005. Consistent with this, as noted earlier (3.2.1) the effect of amendment since 1989 has mainly been to address concerns of fathers (rather than the concerns of mothers, which have centred on fathers' non-compliance), gradually undermining the CSP's original substantive equality approach.[97] This history is suggestive of the ongoing challenges for proponents of substantive equality approaches in the prevailing cultural climate: implementation is one challenge, and maintenance is another.[98]

In the end, however, the formal equality underpinnings of the new child support formula were predictably consistent with the earlier 2006 parenting amendments. Once post-separation parenting law was amended to 'equalize' the post-separation positions of mothers and fathers and encourage shared parenting, child support amendment seemed bound to follow.

### 3.2.3 Impact?: Formal equality messages have increased existing economic disadvantage

Early analysis suggested that as a group, women would be generally worse off after the 2006-08 child support changes and men would be generally better off. Indeed, the chairman of the Taskforce, Patrick Parkinson, considered that that 55–60 per cent of child support assessments would reduce (that is, children would receive less child support) under the new formula.[99] However, Parkinson (and also the AIFS) also considered that these reductions might be offset by other aspects of the reform package and that the 250 per cent real increase in federal government family payments since the current formula was introduced in 1989 should be taken into account.[100] These claims, however, did not tally with calculations by the National Council for the Single Mother and Her Child (NCSMC), which showed that, taking account of those claimed 'gains' and not factoring in the Welfare to

[97] Before the most recent round of amendments in 2006-08, changes included reducing the child support liabilities of payers with at least 30 per cent shared care and/or other dependent children, reducing the payer's exempt income amount and allowing payers to make non-cash non-agency payments in a wider range of circumstances and against the payee's wishes. The main change going against the interests of payers was the introduction of a minimum liability in 1999. This was of very limited benefit to payees and was really about reinforcing the principle of parental financial responsibility. See further: Kate Funder, 'Changes in Child Support' (1997) 48 *Family Matters* 36; Lisa Young, 'Reforming Child Support Laws: Breaking the Cycle' (2005) 30 *Alternative Law Journal* 29.

[98] In Canada, see Fudge, above n 77.

[99] Senate Standing Committee on Community Affairs, Parliament of Australia, *Child Support Legislation Amendment (Reform of the Child Support Scheme—New Formula and Other Measures) Bill 2006 [Provisions]* (2006) 12.

[100] Ibid, 35. For worked examples (prepared by the NCSMC) showing how the formula would apply (math-wise) before and after the changes see: Belinda Fehlberg and Juliet Behrens, *Australian Family Law: The Contemporary Context* (OUP, 2008) 429-30.

Work changes,[101] the child support amendments would still result in an overall drop in income of $10 to $20 per child per week.[102]

The first major work assessing the financial impact of the new formula on child support families, was undertaken by the former Department of Families, Housing, Community Services and Indigenous Affairs. [103] It indicated that while the impacts of the new formula are complex, payers (usually fathers) were more likely than payees to gain under the new formula. Low income payers and payees (i.e. those most at risk of poverty) and recipients with part time or casual employment were likely to be hardest hit. Overall, the changes were likely to be of most benefit to high income earning payers; low income earning payers were likely to fare worse as Family Tax Benefit (a federal government payment available on a means-tested basis to all but the highest-earning families, to assist with the costs of raising children) was no longer split when they had lower levels of care (below 35 per cent of nights or equivalent time). Other predicted winners were payers with regular or shared care and payers with second families.

Findings of subsequent research and analysis are consistent with these predictions. For example, research by Bruce Smyth and colleagues in 2014 and based on quantitative analysis of pre- and post-2008 Child Support Agency (now CSP) data found that 'separated mothers were more likely to be worse off financially than separated fathers. This was particularly the case after the introduction of the new formula'.[104] In 2015, Bruce Smyth and colleagues concluded that although the new formula initially led to lower child support payments, and an increase in the proportion of separated mothers experiencing income disadvantage, payments had increased slightly two years later – but not returning to pre-2008 levels. Compliance and enforcement had also not improved.[105] Adding to this picture of overall loss to mothers and their dependent children, Christine Millward and Belinda Fehlberg's 2013 qualitative analysis of data collected from 60 separated parents interviewed once a year over three consecutive years (2009-2011) found that when children were spending more than 14 per cent of nights with their father (this being the threshold at which a reduction in child support payable occurs post-2008), the infrastructure costs of children[106] were disproportionately borne by majority time parents (mothers), for the following reasons:

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[101] Introduced by Howard federal government from 1 July 2006, and requiring parents applying for Parenting Payment (a government income support payment for low income parents including sole parents) to seek part time work of at least 15 hours per week once their youngest child turns six (if partnered) or eight (if single). See further: Tracey Summerfield, Lisa Young, Jade Harman and Paul Flatau, 'Child Support and Welfare to Work Reforms: The Economic Consequences for Single-parent Families' (2010) 84 *Family Matters* 68.

[102] Senate Standing Committee (2006), above n 88, referring to the NCSMC submission.

[103] Department of Families, Housing, Community Services and Indigenous Affairs, *Report on the Population Impact of the New Child Support Formula* (August 2008). See further: Bruce Smyth and Paul Henman, 'The Distributional and Financial Impacts of the New Australian Child Support Scheme: A 'Before and Day-after Reform' Comparison of Assessed Liability (2010) 16(1) *Journal of Family Studies* 5, 26-7.

[104] Vu Son, Bryan Rodgers and Bruce Smyth, 'The Impact of Child Support Changes on the Financial Living Standards of Separated Families in Australia' (2014) 28 *Australian Journal of Family Law* 193, 229.

[105] Bruce Smyth, Bryan Rodgers, Vu Son and Maria Vnuk, 'The Australian Child Support Reforms: A Critical Evaluation' (2015) 50 *Australian Journal of Social Issues* 217.

[106] Defined as indirect costs of spending time with children, such as provision of appropriate accommodation and bedding: Christine Millward and Belinda Fehlberg, 'Recognising the Costs of Contact: Infrastructure Costs, 'Regular Care' and Australia's New Child Support Formula' (2013) 27 *Australian Journal of Family Law* 1, 4.

> In our study … primary/majority time parents did not necessarily retain the infrastructure of the former family home to support their parenting, so housing and contents-related infrastructure costs commonly accrued to both parents. More generally, minority time parents seemed to have fewer infrastructure costs than primary/majority time parents in terms of providing an adequate current dwelling, supplying beds and other belongings of children or having to buy a new vehicle. The expense associated with transporting children between homes also appeared to be largely shared between minority and primary/majority time parents. Living with new partners was more prevalent among minority time 'regular care' parents, which suggested that, as a group, they had less personal burden in providing infrastructure than did the majority of primary/majority time parents who had stayed single. Further, nearly half of primary/majority time parents said that child support [received] was either less than the assessed amount or was not being paid at all. [107]

As a result, Millward and Fehlberg 'question[ed] the rationale for increased recognition of the costs of contact in the child support formula from 2008'.

### 3.3 Binding financial agreements

The FLA was amended in 2000 to allow spouses to enter into binding financial agreements (BFAs) which effectively exclude the broad discretion of courts to make financial (property and maintenance) orders in the event of relationship breakdown, in relation to matters covered by the agreement (addressed in detail at 3.3.1, below). This change was underpinned by the notion that the parties have equality of bargaining power, and could thus be described as a formal equality approach. However, judicial intervention has played a significant role in undermining this assumption and confidence in the legislation: if courts are cautious about enforcing agreements, the effectiveness of legislation allowing BFAs is in practical terms undermined.

#### 3.3.1 What happened?: The centrality of formal equality to BFAs

Before 2000, it was not possible to enter a binding agreement regarding property or maintenance on relationship breakdown *before* marriage or *during* marriage, and agreements entered *after* separation required court approval to be legally enforceable. The 2000 amendments made it possible to enter a BFA long before separation was an actuality. The 2000 amendments also removed the Family Court's supervisory role, imposing instead a requirement that parties to a BFA each receive independent legal advice. The effect of a BFA is to oust the jurisdiction of the family law courts to decide matters covered by the agreement.

While BFAs were unlikely to be relevant to the majority of the separating population, in cases where there were assets worth protecting, they allowed ringfencing. In so doing, the 2000 amendments were clearly underpinned by the notion of equality of bargaining power. This was superficial in the extreme, given that the most likely reason for a party wanting to enter a BFA is to preserve their existing economic advantage relative to the other party. Although the requirement of independent legal advice[108] and the inclusion of general law

[107] Ibid, 22-3.

[108] FLA ss 90G(1)(b) (spouses) and 90UJ(1)(b) (de facto partners).

and equitable grounds for avoiding agreements[109] reflected awareness that bargaining power might be compromised, setting aside an agreement requires a court application, which is a much more formal and expensive process than entering an agreement. In other words, the fundamental commitment was to make private agreements regarding financial settlements legally enforceable, and thus to support the position of the economically stronger party – usually the man, given men's generally stronger economic position compared to women.[110]

### 3.3.2 Why?: Formal equality as a rationale for the introduction of BFAs

The introduction of BFAs was part of the wider trend in Australian family law toward private agreement and a more contract-based approach, along with increasing emphasis on the private resolution of disputes. The Howard federal government's policy rationale for the changes was to provide parties with greater control over their property and greater choice about how to order their financial affairs, and to reduce conflict between separating couples and to reflect changed community attitudes and needs.[111] It is also possible that BFAs provided a compromise or fall-back position for those seeking property reform when proposals in 1999 for more fundamental family property reform underpinned by formal equality did not proceed (section 4).

### 3.3.3 Impact: The role of judicial intervention in destabilising formal equality messages

A factor not anticipated at the time of the 2000 amendments was that the Family Court would be cautious about enforcing BFAs (and thus having its jurisdiction ousted),[112] which often led to agreements being held non-binding because the procedural requirements set out in the Act had not been followed to the letter.[113] Further legislative amendments to shore up the enforceability of agreements have been characterised by poor drafting,[114] defeating the purpose of encouraging greater practitioner confidence.

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[109] FLA ss 90K (spouses) and 90UM (de facto partners).

[110] Frank Stillwell and David Primrose. 'The Distribution of Wealth in Australia', Evatt Foundation, 2009; ABS, Cat no 4125.0 - Gender Indicators, Australia (February 2015).

[111] For the second reading speech for the 2000 legislation, see Commonwealth, *Parliamentary Debates,* House of Representatives, 31 August 1999, 19807 (Daryl Williams, Attorney General). For an empirical analysis of the early impacts of the legislation, see: Belinda Fehlberg and Bruce Smyth, 'Binding Pre-Nuptial Agreements in Australia: The First Year' (2002) 16 *International Journal of Law, Policy and the Family* 127. To date, there has been no further empirical work.

[112] The Senate Standing Committee on Legal and Constitutional Affairs' *Report on Its Inquiry into the Provisions of the Family Law Amendment Bill 1999* (1999) made no mention of the possibility that the Family Court might be reluctant to enforce agreements. Rather, the concern expressed in submissions was that unfair agreements would be enforced because the grounds for setting aside agreements were too narrow: 3.34-3.46.

[113] Examples include *Black & Black* [2008] FamCAFC 7 (Faulks DCJ, Kay and Penny JJ) (Full Court held an agreement was not binding because the matters on which the parties received independent legal advice had been set out in the annexed lawyers' certificates rather than in the agreement itself as required by section 90G(1)(b) at that time) and *Ruane v Bachmann-Ruane* [2009] FamCA 1101 (Cronin J held that an agreement was not binding as one party received independent legal advice from a lawyer not admitted to practice in Australia).

[114] Particularly the *Federal Justice System Amendment (Efficiency Measures) Act (No 1) 2009* (Cth). Most recently, in 2016, the federal government's proposal to amend the provisions again (the Family Law Amendment (Financial Agreements and Other Measures) Bill 2015) was referred to and received a supportive response from the Senate Standing Committee on Legal and Constitutional Affairs, but no amendment

In recent cases the Full Court of the Family Court had appeared more willing to enforce agreements.[115] However the unanimous decision of the High Court in *Thorne v Kennedy*[116] in November 2017 setting aside pre and post nuptial financial agreements entered into by Ms Thorne and Mr Kennedy on equitable grounds (unconscionable conduct and (by majority) undue influence) should now ensure that courts will closely scrutinise BFAs in order to ensure that the bargaining process leading up to any agreement is 'fair', at least as conceived within the terms of equitable doctrine. This approach is consistent with substantive equality and has enormous potential to undermine the notion of equality of bargaining power underlying the BFA provisions. In practical terms, it thus seems that judicial intervention has destabilised the utility of BFAs, and with that the formal equality messages underpinning them.

## 4. Property?

Our analysis so far demonstrates that formal equality has had obvious purchase in amendments to Australian parenting and child support law. It has also influenced FLA amendment to introduce BFAs – although with considerably less success. While there has been much talk of formal equality in the broader area of property division after relationship separation, this prospect has not – yet – been wholeheartedly embraced. However, it is of concern that its influence appears to be increasing. We acknowledge that, similar to child support,[117] private transfers alone cannot be expected to fully resolve post-separation poverty. While often there is little property to divide,[118] commonly one party to a marriage or de facto relationship (usually the woman) will leave the relationship with a lesser income earning capacity than her ex-partner), and thus significant financial need when the relationship ends. Nevertheless, property division under the FLA nevertheless remains an important strategy, even in low asset cases, for alleviating financial disadvantage after separation.[119]

### 4.1 What has happened so far?: Formal equality as a feature of previous reform proposals

occurred. See further: Owen Jessep, 'Marital agreements and private autonomy in Australia', in Jens M Scherpe (ed) *Marital Agreements and Private Autonomy in Comparative Perspective* (Hart Publishing, 2012) Chapter 1, 17-50.

[115] *Kennedy & Thorne* [2016] FamCAFC 189 (overturned on appeal to the High Court). See also Jacqueline Campbell, 'Binding Financial Agreements Unbound' (2012) 11 *Law Institute Journal* 35, p 39. See also John Wade, 'The Perils of Prenuptial Financial Agreements: Effectiveness and Professional Negligence' (2012) 22(3) *Family Lawyer* 24.

[116] *Thorne v Kennedy* [2017] HCA 49 (8 November 2017).

[117] Above n 77.

[118] Rae Kaspiew and Lixia Qu, 'Property Division after Separation: Recent Research Evidence' (2016) 30 *Australian Journal of Family Law* 1, 12: 'On a continuum reflecting seven possible ranges from negative equity to more than $500,000, one in five parents [of the 10,000 separated parent survey participants interviewed in 2012] indicated having no assets to divide. One-third of parents reported having less than $140,000 to divide, with 19% having less than $40,000 and 15% having $40,000-$139,000. Just over one in ten parents fell into the next two brackets, with 12% of the sample indicating asset pools of $140,000–$299,000 and 12% having $300,000–$499,000. Across the positive asset ranges, the median fell at $200,000'.

[119] Belinda Fehlberg, Christine Millward and Monica Campo, 'Post-separation Parenting Arrangements, Child Support and Property Settlement: Exploring the Connections' (2010) 24 *Australian Journal of Family Law* 214. More recently, see Women's Legal Service Victoria, *Small Claims, Large Battles: Achieving Economic Equality in the Family Law System* (2018).

Most recently, the ALRC's Issues Paper noted that 'A number of suggestions have been made for changes to the Family Law Act's property regime', including:

- adoption of a community of property regime; and
- a presumption of equal contributions, or other presumptions about how property should be split, such as a presumption of equal sharing.[120]

Before this, the Australian Productivity Commission had been the latest body to recommend a presumption of equality in family property division, which it argues would be preferable to the existing broad discretion.[121] The Productivity Commission's 2014 recommendation ostensibly arose out of an interest in making the process 'easier and cheaper for people to work out their entitlements and come to fair agreements about their division of property'.[122] This recommendation is clearly underpinned by formal equality-based arguments.

Given recent interest in formal equality-based family property amendment, our analysis in this section examines past interest in equality-based arguments, explores the reasons for their non-implementation, and suggests that those reasons remain salient.

The FLA (like its predecessor, the Matrimonial Causes Act 1959 (Cth))[123] continues to provides courts with a broad discretion when called on to determine the distribution of property. [124] Courts first identify existing property interests of the parties (being spouses or separated de facto couples) and determine whether it is 'just and equitable' to make any order at all.[125] They then commonly:

- assess the contributions of the parties to their property (financial and non-financial) and to the welfare of their family;
- consider a range of additional factors (focussing on economic disparity between the parties); and
- determine the orders that it would be just and equitable to make.

All of the parties' property, whenever acquired and whether owned individually or co-owned, is available for division, but there is also no presumption that property is co-owned by the parties to the relationship. Broadly, the approach of the legislation is consistent with – or at least accommodates – a substantive equality approach. That is, it is apparently taking account of women's typical post-separation economic disadvantage, arising out of, in particular, women's typical greater responsibility in heterosexual relationships for caring for children both during couple relationships and after they end.

However, the operation of a broad discretionary framework was challenged early in the Family Court's history. That is, the Productivity Commission's recommendation is only the

[120] ALRC, above n 2, 48-9.
[121] Australian Government, Productivity Commission, *Access to Justice Arrangements: Volume 2*, Inquiry Report No 72 (2014).
[122] Ibid 874.
[123] Matrimonial Causes Act 1959 (Cth) s 86.
[124] S 79 (married) and 90SM (separating de facto partners).
[125] *Stanford v Stanford* (2012) 247 CLR 108. For an analysis of the evolution of the 'just and equitable' requirement, see Christopher Turnbull, 'In Metes and Bounds: Revisiting the Just and Equitable Requirement in Family Law Property Settlements' (2018) 31 *Australian Journal of Family Law* 159.

most recent of several inquiries and reports that have been attracted to formal equality, beginning in 1978.[126] In addition, the most appropriate model of equality for property division 'formed the basis for a sustained debate throughout the late 1970s and early 1980s'[127] amongst feminists. So, for example, some members of the Women's Electoral Lobby (WEL), especially Jocelynne Scutt, argued strenuously in the early 1980s for the imposition (unless the parties contacted out) of a community of property scheme, in the form of equal sharing of assets built up in anticipation of and during marriage.[128] This seemed to be for two major reasons: (1) Scutt considered that her approach would make the asset pool of the relationship clear; and (2) it would immediately value women's more typical domestic contributions equally with men's more typical financial contributions. While superficially attractive, Scutt's approach was strongly opposed by other members of WEL. Eva Cox, for example, advocated for a much stronger commitment to substantive equality arguing that:

> [T]his proposal takes no account of the economic inequalities which result from gender inequality. It also fails to compensate for the effect that marriage, or rather workforce exclusion, has on the potential earnings of most women. Starting equal at the point of divorce has been shown to leave the majority of women in poverty in later life.[129]

Subsequently, a 1987 ALRC Report[130] reviewing the property regime recommended against an *equal* sharing (formal equality) approach and supported *fair* sharing between parties of the economic hardship arising on marriage breakdown, a substantive equality approach and a position strongly supported by public submissions, including those from women's organisations.[131] However, the ALRC also recommended legislation prescribing that equality of division should be a starting point.[132] No legislative amendment to this effect occurred, however, possibly because empirical research conducted at the time by AIFS[133] and overseas[134] indicated that although the existing broad discretion was not benefitting women, a shift to a community property approach would make matters worse.

Similarly, in 1992, the Joint Select Committee on Certain Aspects of the Operation and Interpretation of the *FLA* favoured equal sharing as the starting point in the allocation of

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[126] In 1978, a Joint Select Committee on the Family Law Act (the Ruddock Committee) was established, reporting in 1980: Family Law in Australia (AGPS, 1980). See further: Reg Graycar and Jenny Morgan, *The Hidden Gender of Law* (Federation Press, 1990) 130.

[127] Graycar and Morgan (1990), above n 126, 129.

[128] Jocelynne Scutt, 'Equal Marital Property Rights' (1983) 18 *Australian Journal of Social Issues* 128, excerpt reproduced in Graycar and Morgan (1990) above n 126, 131-2.

[129] Eva Cox, 'Beyond Community of Property – A Plea for Equity' (1983) 18 *Australian Journal of Social Issues* 142, 143.

[130] ALRC (1987), above n 7, para 273. The ALRC's work was preceded by a discussion paper in 1985 and was informed by empirical research by the AIFS (namely: Peter McDonald (ed), *Settling Up: Property and Income Distribution in Australia* (Prentice-Hall of Australia, AIFS, 1986 and Kathleen Funder, Margaret Harrison, and Ruth Weston, *Settling Down: Pathways of Parents after Divorce* (AIFS, 1993).

[131] See further: Graycar and Morgan (1990), above n 126, p 137.

[132] ALRC (1987), above n 5.

[133] McDonald (ed) (1986), above n 130; Funder et al (1993), above n 130.

[134] ALRC (1987), above n 5; in England and Wales, see John Eekelaar and Mavis Maclean, *Maintenance after Divorce* (Clarendon Press, 1986); more broadly, see Lenore Weitzman and Mavis Maclean (eds), *The Economic Consequences of Divorce: The International Perspective* (Clarendon Press, 1991). See further: Hunter (2005), above n 52.

matrimonial property, with courts having a discretion to depart from this to take account of exceptional circumstances (such as the duration of the marriage, care and control of children, and home making, child rearing and financial contributions of the parties).[135] This resulted in the Family Law Reform Bill No 2, which would have introduced a presumption of equal contributions in *FLA* s 79 proceedings. The Bill was read in Parliament in 1995, but lapsed when the Labor government lost the 1996 federal election. Then in mid-1999, a discussion paper, *Property and Family Law: Options for Change*, was prepared and circulated for comment by the federal Attorney-General's Department.[136] The discussion paper canvassed two options for law reform: (1) a starting point of equal sharing, based on an assumption of equal contribution; and (2) a community of property regime under which each party would receive 50 per cent of 'communal assets' (being property acquired by either or both parties during the marriage, and net increases in value during cohabitation/marriage of all earlier acquired property). Both options provided for bases for departure from the starting point of equal sharing (such as the duration of the marriage, care and control of children, and home making, child rearing and financial contributions of the parties), although for option 2 the grounds were more limited.[137] Responses to the discussion paper did not provide clear support for either approach, and so the Attorney-General's Department decided not to consider significant amendments to the *FLA* property provisions.

### 4.2 Why not?: Explaining formal equality's lack of traction in property reform

Our outline in the previous section underlines that family property law amendments based on formal equality have been considered three times since 1975, and has consistently stalled due to concern that it would operate to women's further economic disadvantage.

So why has formal equality repeatedly failed to gain traction in property reform, including at times when it has been gaining increasing traction in parenting reform (section 3)? Hunter has suggested that there have so far been three phases of 'panic' about the operation of the family law system: the first focused on the principle of no fault divorce, the last (and continuing) on child custody and child support, and the second on the distribution of property. Hunter suggests that 'panic over children' replaced 'panic over property' in the late 1990s for a range of reasons related to economic and social change (see section 3). Hunter further suggests that property reform was a less significant issue for the majority in the community who do not own significant assets, and that the introduction of BFAs in 2000 may have been enough to address the concerns of the minority for whom the existing discretionary approach was an issue:

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[135] Australian Parliament, Joint Select Committee on Certain Aspects of the Operation and Interpretation of the Family Law Act, *The Family Law Act 1975 – Aspects of Its Operation and Interpretation*, (AGPS, 1992) 233-4; Australian Parliament, Senate Legal and Constitutional Committee, *The Family Law Reform Bill 1994 and the Family Law Reform Bill (no 2) 1994* (1995).

[136] Attorney-General's Department *Property and Family Law: Options for Change*, above n 5.

[137] Option 1 allowed departure on the basis of retrospective and prospective factors, while Option 2 allowed departure only on the basis of the prospective factors (with the report presenting two bases for consideration of this component: a 'future needs' approach and an approach focussing on the economic consequences of marriage and its breakdown): Attorney-General's Department *Property and Family Law: Options for Change*, above n 5, 36-7, 42-3.

> Part of the reason for the lack of support for more far-reaching matrimonial property reform is that serious property division is a minority issue. The minority for whom this is an issue is probably equally well, if not better, served by another set of recent amendments to the Family Law Act relating to pre-nuptial agreements, and it's hard to see this aspect of family law reigniting as a concern. Instead, the focus of family law debates has shifted to children and become dangerously overheated.[138]

While calls for family property reform may have been relatively subdued since the late 1990s, the role of judicial discretion has perhaps shadowed and foreshadowed the likelihood of renewed discussion of legislative amendment based on formal equality. Research suggests that after the 2006 parenting amendments, there has been a reduction in the share of property received by mothers.[139] Interviews with family lawyers conducted as part of the AIFS Evaluation of the 2006 shared parenting amendments suggested that post-amendment there has been a reduction in the share of property received by mothers by about 7 per cent (from 63 per cent to 57 per cent) post-2006.[140] This appears to represent a shift away from the position that had developed from the mid-1990s, when more significant adjustments of around 10-15 per cent on the basis of economic disparity between the parties began to be made,[141] to take account of women's usually greater responsibilities for caring for children before and after separation, leading to diminution in their income earning capacity but not that of their male counterparts. The researchers suggested several possible reasons why women's property settlements may have decreased post-2006, including bargaining dynamics/trade-offs affected by the shared parenting amendments (for example, mothers trading away property to resist fathers' shared time claims), and that shared time arrangements reduced the likelihood and extent of adjustments to take account of the parties' different economic positions. The AIFS findings suggest that formal equality messages are having an impact regarding how the broad judicial discretion is being interpreted and applied post-2006, and suggest that if anything, there may be a need to enhance substantive equality messages to respond to ongoing evidence of women's economic disadvantage on relationship breakdown.[142]

## 5. 'Alternatives' to equality

Our analysis suggests that equality-based arguments have not served women and children well over the past two decades. Yet in the property context and more broadly, there are indications of the continuing pull of formal equality. All of this gives rise to important

[138] Hunter (2005), above n 52.
[139] Kaspiew et al (2009), above n 58, 225.
[140] Ibid. More recently, analysis by the AIFS of data collected in 2012 from 10,000 separated parents reporting property settlement reached through a range of pathways (mainly discussion or 'it just happened'), but also mediation, lawyers and adjudication) 'suggests a median division to mothers of 57%'. The authors also noted that ' a considerable spread underlies this figure, with the most common kinds of distributions occurring across three ranges: most common was a range of 40–59%, reported by 34% of parents': Kaspiew and Qu, above n 118, 19. Chris Turnbull's analysis of 200 first-instance property settlement determinations made between July 2012 and June 2015, mainly by the Federal Circuit Court, similarly found that 'The overall mean result was 54% to mothers and 46% to fathers': Christopher Turnbull, 'Family Law Property Settlements: An Exploratory Qualitative Analysis' (2018) 7 *Family Law Review* 215, 226.
[141] Eg *Waters & Jurek* [1995] FamCA 101, per Fogarty J.
[142] De Vaus et al (2014), above n 7; Laurie Brown, 'Divorce: For Richer, for Poorer', AMP.NATSEM Income and Wealth Report Issue 39 (December 2016) 5. See further: Belinda Fehlberg and Lisa Sarmas, 'Australian Property Law: What Reform Might be Needed?', forthcoming, *Australian Journal of Family Law*, 2018.

questions for us regarding whether equality-based arguments should be pursued by feminists in this field or whether there are alternatives that could reframe the debate.

We are of course not alone in contemplating these questions. The project of formulating alternatives to equality has been a continuing one for feminists for some years. This includes the recent work of Martha Albertson Fineman.[143] Fineman describes the concept of equality as operating in a limited way amounting to 'little more than a mandate for sameness of treatment'. She argues that this is due to prevailing conceptions of autonomy and liberty, which construct the liberal subject as a competent social actor requiring only the right to contract, and fails to see dependency and vulnerability as 'not deviant, but natural and inevitable'.[144] Fineman puts forward an alternative approach to justice, focusing on vulnerability. Fineman's thesis is that as vulnerability is 'at the core of our understanding of what it means to be human',[145] the State and its institutions have a responsibility to operate in ways that address vulnerability and support individuals to build resilience (that is, the resources needed to reduce vulnerability). This approach, Fineman suggests, 'has some significant strength as an independent universal approach to justice'.[146] Fineman, however, does not discuss what role the vulnerable individual might have in reducing their vulnerability: is vulnerability always purely the result of external circumstances? Also, Fineman does not provide a strategy for her thesis to gain traction in a political environment that shows decreasing concern for the vulnerable.

Rosemary Hunter has also questioned the utility of equality discourse. She argues that while equality is a powerful concept *rhetorically* (in liberal societies equality is seen as 'good'; inequality is seen as 'unfair'), it is not an effective *descriptor* of disadvantage (we can't agree on whether we are or are not equal) and it therefore lacks *normative* punch in terms of generating support for remedies to redress inequality.[147] She suggests that feminists should develop their own concepts (as they have already done in some areas, for example by naming sexual harassment, marital rape etc) that better describe disadvantage and that ultimately lead to more effective remedies to address it.[148] Hunter prefers an approach that 'describe(s) particular phenomena – elements of women's experience ( eg sexual harassment ) – rather than providing overarching analyses of women's position in law and society' or suggesting 'grand theoretical substitutes for in/equality'.[149]

Other feminists (for example Elsje Bonthuys[150]) have argued that alternatives to equality, such as feminist work that focusses variously on social justice, on citizenship, on 'individual

[143] Fineman (2013), above n 29.
[144] Ibid 17.
[145] Ibid 20.
[146] Ibid 14.
[147] Hunter (2008), above n 15, 81-2.
[148] Ibid 82-3.
[149] Ibid 83. Note, however, the suggestion previously made by one of us (Morgan) that sexual harassment may require feminists to make an equality connection if we are to avoid going down the prudish path and conceiving of it as 'about morality' rather than as the product of gendered power: Jenny Morgan, Sexual Harassment and the Public/Private Dichotomy: Equality, Morality and Manners' in Margaret Thornton (ed) *Public and Private: Feminist Legal Debates* (OUP, 1995) 89-110.
[150] Elsje Bonthuys, 'Equality and Difference: Fertile Tensions or Fatal Contradictions for Advancing the Interests of Disadvantaged Women?' in Margaret Davies and Vanessa E Munro (eds) *The Ashgate Research Companion to Feminist Legal Theory* (Ashgate, 2013) 85-104.

freedoms and capabilities' or on formulating specific concepts that 'capture women's disadvantage', still 'implicitly rely on notions of equality or at least include equality as part of their analysis'.[151] Bonthuys notes that these approaches 'link gender equality to socio-economic equality, urge engagement with structures, institutions and practices which have not been traditionally regarded as "legal", and suggest new strategies and pathways for feminist activists.'[152] She argues that 'rather than constituting viable alternatives to equality, the insights offered could be, and have been fruitfully used to enrich equality concepts and to counteract conservative legal interpretations of equality'.[153]

We agree with Bonthuys that there is value in the project of enriching equality concepts. We would not therefore advocate for the wholesale abandonment of equality discourse by feminists, as we consider that it may still prove to be strategically useful in specific contexts. In the family law context at this particular time, however, we consider that it might also be useful to further explore Hunter's strategy by developing alternative concepts to describe elements of importance to women's experience (in family law) that will hopefully prove to be powerful rhetorically, descriptively and normatively.

In the family property context, two of us (Fehlberg and Sarmas) have proposed the concept of providing for the 'material and economic security' of the parties (focusing on housing and income (with current research on the minimum income to live a healthy life providing a minimum starting point, and informed by what is reasonable given the available property) as a key factor for consideration by courts when making property orders on relationship breakdown.[154] We argue that this is preferable to the current approach in the FLA which tends to give more weight to the parties 'contributions' than it does to their 'needs'. Invoking the concept of 'material and economic security' rather than 'remedying inequality' may help avoid a dangerous engagement with the concept of equality in this debate – dangerous because, as noted above, this concept has been well and truly hijacked by formal equality discourse. No matter how clear and unequivocal the empirical evidence regarding women's material and economic disadvantage (generally, but particularly post-separation), reform proposals since the 1980s have consistently been underpinned by a formal equality approach that does not address that issue.

The concept of 'material and economic security' satisfies Hunter's call for new concepts that have rhetorical, descriptive and normative power. In terms of rhetoric, 'economic and material security' has purchase, particularly in the family law context where it would be difficult to argue that post-separation, women (especially those with dependent children, but also those without) should be left in circumstances of material and economic insecurity. The phrase is also effective as a descriptor of disadvantage, as there are clear and uncontroversial socio-economic measures of insecurity such as homelessness (housing

[151] Ibid 86-9.
[152] Ibid 89.
[153] Ibid 86.
[154] Fehlberg and Sarmas, above n 142. In this paper we propose that the minimum starting point for achieving economic and material security is current research on the minimum income to live a healthy life: see Peter Saunders and Megan Bedford, *New Minimum Income for Healthy Living Budget Standards for Low-Paid and Unemployed Australians*, Social Policy Research Centre, UNSW Sydney (August 2017). Note also that we suggest that material security is broader than economic security and would include, for example, a safe home for a party escaping family violence.

insecurity), the poverty line and so forth.[155] All this facilitates the normative claim that the attainment of material and economic security of the parties should be a primary goal of family property settlements. Even in the current neo-liberal context, it is difficult to argue that an ex-partner should be left in a state of material and economic insecurity, even where the other partner claims that they have made greater contributions or where addressing potential insecurity may involve allocating a significant proportion of family property to the more vulnerable party.[156]

In relation to BFAs, feminists would do well to draw on, refine and strengthen equity's concepts of unconscionable dealing and undue influence, particularly as these doctrines have recently been effectively invoked by the High Court to set aside BFAs in *Thorne v Kennedy.*[157] Rhetorically, the claim that an agreement should not be 'unconscionable' or the result of 'undue influence' is even more powerful than arguing that it should not be 'unequal'. Normatively, once it is established that there is unconscionable conduct or undue influence, the agreement will invariably be set aside as these are long-established equitable doctrines that have recently been unequivocally applied in the BFA context by the High Court. As a descriptor, these concepts do have some limitations, as they focus on unconscionability/undue influence in the bargaining process, rather than on whether the outcome of the bargain is fair to the parties.[158] This means (in addition to the significant practical inhibitors of cost and difficulty involved in applying to the court) that not all BFAs that perhaps should be set aside will necessarily be caught by these doctrines,[159] although courts have said that a grossly unequal bargain will be suggestive of an unfair process and therefore of undue influence or unconscionable dealing.[160] Despite these limitations, the powerful rhetorical and normative punch of unconscionability and undue influence arguably makes them a more effective means of addressing the gendered disadvantage brought about by BFAs than framing the issue as one of inequality between the so-called bargaining parties. Given that statutory family property provisions were originally enacted in response to equity's shortcomings regarding recognition of non-financial (especially homemaker) contributions to property,[161] the irony of drawing on equity to reduce the harsh impact of statute does not escape us here.

In relation to parenting and child support, formal equality arguments made by fathers' rights groups and reflected in legislation perhaps both need to continue to be addressed

[155] See the text in n 154 for our preferred approach as to the appropriate measure of material and economic security. We acknowledge that there may be disagreement as to whether this is the most appropriate measure, but the fact remains that uncontroversial measures such as the poverty line and homelessness do exist and can be invoked as minimum requirements for material and economic security.
[156] For further analysis of the concept of providing for the 'material and economic security' of the parties, see Fehlberg and Sarmas, above n 142 and n 154. In this paper we put forward this concept as one important factor to be taken into account within a reformulated statutory discretion that also includes the taking into account of the reasonable housing requirements of dependent children and compensation for relationship-generated loss. In the paper we propose that any surplus left over after these factors have been considered should be divided equally, in the absence of exceptional circumstances (which might include a relationship of short duration, the absence of children or a significant original contribution).
[157] *Thorne v Kennedy* [2017] HCA 49 (8 November 2017).
[158] Gino Dal Pont, *Equity and Trusts in Australia* (6th ed, Law Book Co, 2015) 308.
[159] Whereas the concept of equality of outcomes would catch substantively unfair bargains.
[160] *Thorne v Kennedy* [2017] HCA 49, [56].
[161] See further: *Moore & Moore* [2008] FamCA 32, [146]-[185] (Carmody J).

through challenging current legislation, and advocating for reform squarely based on the language of the best interests of the child. This would include repealing objects and principles first introduced in the 1996 amendments (and amended in 2006 and 2012) to inform the determination of parenting cases, to the effect that the best interests of the children involve them having meaningful involvement, the right to know and be cared by and the right to spend regular time and communicate regularly with 'both of their parents'.[162] It would also extend to repeal of 2006 amendments introducing the presumption of equal shared parental responsibility and the related requirement for courts that propose to order equal shared parental responsibility to also to consider ordering shared time.[163] Child support legislative reform requires, most obviously, challenging the gendered structure of the formula. These changes, informed by a greater focus on children's physical and emotional security, as well as material and economic security (in this context, of the child), as discussed above in relation to property division, would go some way towards putting substantive, child-centred content into the 'best interests' concept without invoking arguments about theoretical 'rights' or equal responsibilities in relation to care.[164] Rhetorically, descriptively and normatively, the child's best interests, with a specific focus on their physical, emotional, material and economic security, is perhaps a more powerful concept than whether men and women are treated 'equally' in relation to decisions, policies and legislation on parenting and child support.

It may be that the concepts of material and economic security, best interests of the child and unconscionable dealing/undue influence (which we have used to 'describe particular phenomena – elements of women's experience'[165] in family law), might themselves become as politically problematic as has the concept of 'equality' both within the family law context and more broadly. We do, however, consider that it is worthwhile to further explore and to attempt to test the effectiveness and potential of these concepts to improve the lot of women and children in family law.

## 6. Conclusion

In this paper we have argued that formal equality has had significant influence in Australian family law, and that continuance of this influence is a cause for concern due to its negative impacts on women and their dependent children. While there has been some judicial pushback to this trend in the area of BFAs, in parenting, child support and, less successfully, in property allocation, formal equality arguments have been strongly put and appear to

[162] FLA s 60B.

[163] FLA s 61DA and 65DAA. This change has been favoured by researchers including Chisholm, above n 63. See further: Helen Rhoades, Nareeda Lewers, John Dewar and E Holland, 'Another Look at Simplifying Part VII' (2014) 28 *Australian Journal of Family Law* 114.

[164] As noted earlier two of us (Fehlberg and Sarmas) have also proposed that in relation to the allocation of family property on separation, the first consideration should be 'the reasonable housing requirement of any dependent child of the parties': see above n 154. This would mean that the child's best interests would also be an important factor in property settlements. For previous argument to the effect that children's housing needs should receive greater emphasis in Australian family property law, see: Patrick Parkinson, 'Unfinished Business: Reforming the Law of Property Division' (2000) 14 *Australian Family Lawyer* 1, 5; Tom Altobelli, 'Submission to the Family Law Pathways Advisory Group' in *Family Law in Australia: Principles & Practice*, Tom Altobelli (Ed), (Chatswood, LexisNexis Butterworths, 2003) 525.

[165] Hunter (2008), above n 15, 83.

have readily engaged the support of government. The ALRC's current review of the FLA provides an opportunity to attempt to provide a counter-discourse to that of formal equality in relation to any future law reform in this area.

One way of reframing the debate is to consider alternative approaches to arguments based on 'equality'. We have suggested that it may be useful, at this particular time, to further explore Rosemary Hunter's strategy of forgoing over-arching concepts and attempting, instead, to describe particular aspects of women's experience in family law. While we are not advocating that feminists abandon equality-based arguments altogether, we consider that it is imperative that we remain nuanced and responsive to the prevailing cultural and political context in which we operate.