1 of 1 DOCUMENT: Australian Journal of Family Law/(2013) 27 AJFL No 3/Articles/ Developing a consistent message about children's care needs across the family law system

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Developing a consistent message about children's care needs across the family law system

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This article reports on the findings from the first stage of a research project that is exploring whether it is possible to create a decision-making framework for children's matters that is structurally simply, responsive to children's developmental needs, and capable of application by each of the different dispute resolution sectors in the family law system. The focus of this article is on the analysis of opinions provided by family relationship sector professionals in response to a series of dispute vignettes about children's care arrangements, and a comparison of the reasoning articulated by these practitioners and the approach to decision-making in the reported judgments on which the vignettes were based.

1 Introduction

Recent years have seen a growing policy interest in delivering integrated services to clients of the family law system.[1] This development has particular relevance for the legal and family relationships sectors, given the evidence that parents who use a family dispute resolution service are highly likely to also engage a solicitor.[2] However, while considerable work has been done to enhance collaboration between these groups, and to create a more seamless service system for separated families,[3] one area of practice tension has, as yet, received little attention.

In 2009 the Australian Institute of Family Studies (AIFS) published its evaluation of the operation of the 2006 amendments to Pt VII of the Family Law Act 1975 (Cth).[4] Among other things, that report revealed that many in the legal profession were finding the amendments difficult to use,[5] and suggested that, as a consequence of the legislative changes, some very different messages about children's care needs were emanating from the system's different dispute resolution sectors.[6] While the majority of practitioners in the family relationships sector reported being able to work with parents in a child focused way, this was not always the case for legal professionals.[7] In addition to the statutory requirement to consider particular kinds of care arrangements,[8] family lawyers suggested that the complexity of the new decision-making framework was hampering their ability to achieve developmentally appropriate arrangements for children.[9] As one practitioner observed, although the best interests of the child had remained the paramount consideration for decision-makers, it had a tendency to get 'lost in amongst all these loops and hoops and criteria that one must rather artificially go through'.[10]

This article reports on the first stage of a research project that was designed as a response to these issues. The project set out to explore two research questions. First, is it possible to develop a child focused decision-making framework for parenting matters that can 'speak to' each of the professional communities in the family law system simultaneously? Second, can we reduce the legislation's complexity without sacrificing its capacity to respond to the particular needs of individual children and families?

The next section of the article sets out the background to the project. This is followed by a description of the aims and rationale for the project (in Part 3) and its methodology, including a discussion of the strengths and limitations of the method used in Stage 1 of the project (in Part 4). Part 5 discusses findings from interviews with family relationships sector professionals, who were asked to respond to parenting dispute scenarios and to draw on their expertise and experience to provide opinions about appropriate outcomes. Part 6 provides a comparative analysis of these responses

and judicial decision-making under Pt VII of the Family Law Act. In Part 7 we explore the implications of these insights for our research questions. The article concludes by foreshadowing the issues we are exploring in the second part of our study.

2 Background to the project

The idea for the project grew out of complaints raised by practitioners about the practice implications of the 2006 amendments to Pt VII. Those amendments effected two sets of changes to the family law system. The first involved the introduction of a new legislative framework for decisions about children's care arrangements. This included a number of new provisions, such as a rebuttable presumption of 'equal shared parental responsibility' for children and a linked directive to consider ordering an equal care time arrangement, or failing that an arrangement for 'substantial and significant' time with both parents, where no protective concerns exist.[11] The amendments to Pt VII also divided the traditional 'best interests' checklist into two tiers, with two factors designated as 'primary considerations'. The first primary consideration requires the courts to consider the benefit to the child of having a 'meaningful relationship' with both parents;[12] the second requires the courts to consider the need to protect the child from harm caused by being 'subjected to or exposed to abuse, neglect or family violence'.[13]

The 2006 amendments also added the requirement that parents not affected by violence or abuse must attempt to settle their dispute through a family dispute resolution service before initiating legal proceedings.[14] This reform was supported by substantial funding to the family relationships services sector, which provides mediation and counselling alongside other support services such as parenting education, relationships skills courses, financial advice and help-lines. As part of this development, the government established 65 dedicated Family Relationship Centres around the country to provide low cost advice and dispute resolution services to separating parents.[15]

While the various reviews of the impact of these changes indicated significant benefits for many families, especially for those who used family relationships services,[16] they also revealed the emergence of unintended effects, including the production of different messages about children's care needs across the system's different dispute resolution sectors.[17] On the one hand, the amendments provided the legal profession and the courts with a new set of guidance for deciding children's matters -- one that includes 'not just *factors* but possible *results*'[18] -- which they are required to apply.[19] At the same time, they encouraged separating parents to use one of the system's family dispute resolution services, where settlements are shaped by an understanding of children's developmental needs, and where practitioners tend to eschew 'negotiations based on legal rights and obligations'.[20]

Other research and commentary published around the time of the AIFS report indicated that these approaches were not just different, but incompatible, and that the divergent messages about children's care needs was a source of some considerable frustration for family relationships sector professionals. In one early post-amendment study, family dispute resolution practitioners expressed concerns about the impact of the new law on lawyers' advisory practices, reporting that solicitors were not always challenging clients whose proposals were in line with the legislation's shared time priorities but were not conducive to the child's healthy development in the circumstances.[21] Others from this sector complained about the law's narrow understanding of harm to children, arguing the legislation was out of step with knowledge about children's developmental needs.[22]

In addition, the AIFS evaluation indicated that the legislation's complex suite of provisions had added to the legal profession's workload. Lawyers and judges reported the new framework had made 'advice-giving, litigation and judgment-writing' lengthier and more complicated than had previously been the case.[23] The AIFS researchers also noted that important aspects of the legislative changes had been widely misunderstood by separating parents,[24] creating expectations of rights and unrealistic claims that needed to be managed by family law system professionals, sometimes with great difficulty.[25]

In 2012, the Gillard government enacted further reforms to address a number of these issues, particularly in relation to concerns about family violence.[26] However, these changes did not address the problems associated with the complexity

of the legislation, or the inconsistent messages about children's care needs that were emanating from the system's different professional communities.[27] A number of solutions to these problems have been mooted since the AIFS evaluation. In 2010, Rick O'Brien, the then Deputy Chair of the Family Law Section of the Law Council of Australia, suggested the need for a return to a more discretionary decision-making model, one that is not 'constrained by any presumptions' about parental responsibility or time.[28] In a similar vein, Richard Chisholm has argued that the responsive capacity of the courts and the legal profession would be enhanced by simplifying Pt VII,[29] and by providing a clear direction that advisers should 'not assume that any particular parenting arrangement is more likely than others to be in the child's best interests'.[30]

Our study was designed with a similar concern to address the issues of complexity and responsive capacity in Pt VII. However, we were also interested in exploring the apparent dissonance between the legislation's messages and those embodied in family dispute resolution practice, and how these might be harmonised.

3 Aims and rationale for the project

The primary aim of the present project is to examine the possibility of developing an alternative decision-making framework for children's matters, one that is structurally simple, responsive to children's developmental needs, and capable of application by the range of practitioners across the different dispute resolution sectors of the family law system. Our methodology for pursuing this aim is centrally concerned with professional practice experience, and, more particularly, with understanding how the different professional communities in the family law system work with clients in parenting matters. In this way our study can be distinguished from other projects about post-separation parenting and the law, such as empirical studies that have sought to identify the impact of legal norms on children and parents,[31] and the recent Association of Family and Conciliation Courts think-tank which aimed to resolve disagreements between different stakeholder constituencies about the most appropriate child custody standard.[32] In particular, our project does not seek to challenge the paramountcy principle as the guiding criterion for decision-making about children's care arrangements.[33] Neither is it looking to codify the relevant child development research.[34] In contrast to these perspectives, our study's concern with the law lies in its relationship to the different advisory and decision-making practices of family law system professionals.

In the project's first stage we explored the practices of family relationships sector professionals, who draw on their knowledge of children's development and family dynamics in working with clients. In exploring these practices we were not seeking to extract any principles about child development to codify in law. Although we were concerned to understand the difference that a research-informed approach might make, we were conscious of the risks of attempting to capture the evidence base underlying these practices, given its complex, fluid and often contested nature.[35] Instead, our interest was in gaining insights into how family relationships professionals use their training and experience to help parents settle arrangements for their children's care. That is, we sought to reveal the architecture of their reasoning process, and to understand how this differs from the approach and messages embodied in Pt VII.

The focus of Stage 2 of the project is on the practices of judges and lawyers, and their experiences of using Pt VII in their work. This stage also explores the potential applicability to legal advice and court practice of a revised decision-making framework structured around the insights gleaned from the Stage 1 investigation of family dispute resolution practices. However, in asking practitioners to 'road test' this framework, we were not assuming that the approach used by family relationships sector professionals is inherently superior to the practices of the legal profession, or that the courts are producing poor outcomes for children. Despite the complaints about the constraining nature of the Pt VII framework, it is likely that lawyers and judges have become well versed in working with what Chisholm has called its 'elaborate' guidelines to ensure the needs of individual children and families are met.[36] Our project's interest in the law's responsive capacity is not borne of evidence that the courts are making bad decisions; but from the evidence that the law is not supporting the work of legal professionals as it should.

Finally, we should say something about why we believe that developing a coherent understanding of children's care needs across the family law system is important.[37] Our concern here is not with producing a uniform approach to

dispute resolution, or with creating a hybrid family law system professional who is fluent in both law and social science. As the *Enhancing Inter-Professional Relationships* study highlighted, family law system clients get 'added value' from a complementary services approach, where experienced lawyers and dispute resolution practitioners can bring their respective skills and knowledge to the dispute resolution process.[38] But that study also demonstrated the importance to this enterprise of practitioners having shared goals and expectations, including a shared understanding of the child's best interests.[39] We appreciate that the system's different dispute resolution sites -- especially the courts *versus* family dispute resolution services -- may have different client populations. However, the AIFS evaluation has shown that the issues which families present with in each sector are broadly similar,[40] and that many clients use more than one service.[41] Against that background, we believe it will be important for clients to receive a consistent message about their children's needs from each of the professionals they engage with, regardless of where that person is located in the system.

4 Methodology

4.1 A two-stage approach

The project was conducted in two stages. The first stage looked at the ways in which family relationships sector professionals work with clients and approach decisions about children's care arrangements, and how this resembles and differs from the approach embodied in Pt VII. To facilitate this investigation, we created a series of parenting dispute vignettes based on judgments of the family courts. We recorded interviews with a sample of experienced practitioners in which they responded to these vignettes, with the aim of eliciting information about the process and factors they used to consider developmentally sound arrangements for the children in the various scenarios.[42] The analysis of these responses was then compared to the process of decision-making articulated in the reported judgments on which the vignettes were based, with a view to discerning areas of commonality and divergence. In line with our research questions, our comparative analysis also focused on teasing out the ways in which the approach used by services sector professionals could be used to harmonise the messages about children's care needs within the family law system, and to assist the development of a less complicated and more responsive decision-making framework for the courts.

In the project's second stage, which is currently in progress, we are exploring the advisory and decision-making practices of the legal profession, through a series of roundtable forums and individual interviews with experienced practitioners and judicial officers and an on-line survey of family lawyers around Australia.[43] The focus of our investigation in this stage is two-fold. The first objective is to gain a detailed understanding of practitioners' and judges' day-to-day experiences of using Pt VII in their work, and the extent to which the problems reported in the AIFS evaluation continue to affect legal practice. As noted above, the second aim is to explore the potential applicability to legal advice and court practice of a revised decision-making framework structured around the insights gleaned from our Stage 1 data.

4.2 The Stage 1 participant sample

Stage 1 of the project was conducted in late 2011 and 2012. It entailed in-depth semi-structured interviews with 39 experienced family relationship professionals recruited from seven well established community sector organisations that have been providing family relationships services in Australia for at least 25 years.[44] The organisations from which the sample was drawn operate in metropolitan and inner regional areas in three Australian states (Western Australia, New South Wales and Victoria). The Chief Executive Officers of the respective organisations were asked to identify experienced practitioners working in their organisations who could potentially participate in the study and to pass on written information about the project to these personnel.

Participants were purposively selected for inclusion in the study based on their experience in the family law system and their training and professional development in relation to children's developmental needs and complex family dynamics. All of the practitioners who were interviewed for the study had worked extensively with separated families since the introduction of the 2006 amendments. Each had at least 2 years of experience working in the family relationships sector of the family law system (range 2-22 years), in addition to an extended professional history providing social or clinical

support services for parents and children in the broader field of child and family welfare.[45]

The sample of participants covered a wide range of disciplinary backgrounds that included degrees in social work, psychology and education, and diplomas in counselling, family therapy, social welfare and community services. Participants described having previous work experience in relationship, family and drug and alcohol counselling, child protection, housing, mental health support services and domestic violence services.[46] Most of the practitioners in our sample had qualifications in a discipline directly related to their current work (n = 34/39). 'Psychology' was the most common disciplinary training (n = 19 practitioners), followed by social work (n = 12 practitioners).

4.3 The dispute vignettes and interviews

The vignettes used in Stage 1 were based on a selection of post-2006 judgments of the family courts in contested parenting matters.[47] The judgments were drawn from the courts' websites and AustLII using a purposive approach to select cases that reflected a mix of the most frequently raised factual issues in contested matters, as identified in the AIFS evaluation report.[48] These included relocation disputes, cases with child protection concerns and disputes about shared time arrangements. The issues presented in the vignettes are also characteristic of the disputes seen in family dispute resolution services,[49] as verified by our participants.[50] This was important as the plausibility of the scenario is crucial to the design of vignette stimuli.[51]

A final sample of 6 vignettes was settled by the research team and piloted by the project's Research Assistant with senior practitioners from 4 of the participating services.[52] The parties and children in the original judgments were given pseudonyms for the purposes of the vignettes and the geographical locations were changed. The 6 judgments, the vignette names and the central issues they engage with are as follows:

1. 'Sally & Ray', based on the 2011 case of *Carlyle & Muldoon*,[53] a relocation dispute involving a child with significant health issues;
2. 'Katie & Steve', based on the 2009 case of *Benelong & Elias*,[54] a relocation application in relation to an infant where there were allegations of family violence;
3. 'Joanna & Brett', based on the 2009 case of *Henley & Marple*,[55] which involved an application to alter an existing equal care time arrangement and concerns about parental alignment;
4. 'Peter & Sylvia', based on the 2007 case of *Seaford & Seaford*,[56] which involved an application for equal time orders and parental mental health issues;
5. 'Sara & Victor', based on the 2010 case of *Vaughn & Vaughn & Scott*,[57] which involved parental mental health issues and involvement by the child welfare authorities; and
6. 'Kelly & Patrick', based on the 2011 case of *Beale & Beale*,[58] which involved parents in an on-again/off-again relationship and drug and alcohol misuse concerns.

Participants were provided with a summary of the history of the dispute, the facts and arguments raised by each party, the parenting arrangements they proposed, and a summary of the Family Report and any expert evidence. These materials were all derived from the reported judgment.

The interview schedule was developed with a view to enabling breadth and richness of responses while maintaining structure in the questioning so that responses could be compared across interviews.[59] It was divided into two parts. The focus of the questions in the initial part of the interview was on the participant's usual work practices in working with clients. Participants were asked to describe their disciplinary background and experience in child and family welfare, as well as their current role at the service where they worked. They were also asked whether the issues raised in the vignettes were typical of those they saw in their usual practice. Participants were then asked to explain how they 'would proceed to work with the parents in the scenario' if they were clients at their service, and what their 'main aims' would be in working with those parents.

In the second part of the interview, participants were asked to 'step outside' their usual (advice and facilitation) role and provide an opinion about the children's care arrangements. In this open-ended part of the interview, participants were

asked:

> Drawing on your child development knowledge and practice experience, what would you consider to be developmentally sound arrangements for the child(ren) in this case?

Participants were also asked to explain the reasons for their opinion and to identify 'the factors in the scenario that were important' for them in coming to that view.

Copies of the interview schedule and two vignettes were sent to participants prior to the interview to allow them to consider their approach to each dispute and consult colleagues if needed.[60] Interviews were conducted by the project's Research Assistant,[61] and all interviews were digitally recorded with the participant's consent.[62] Each interview took approximately 1 hour.

4.4 Data analysis

The interview transcripts were transcribed by a commercial transcription service and participants were assigned a coded identifier linked to the particular vignette to protect their anonymity in reporting. Each vignette was the subject of between 9 and 12 opinions. This allowed the research team to discern a common decision-making process across the transcripts and to tease out common factors that influenced the decision-making process. The interview transcripts were coded and analysed by three members of the project's multi-disciplinary research team,[63] with assistance from a panel of advisers with expertise in child development.[64] The transcripts were coded in the first instance to identify the *factors* participants used to determine the child's best interests, and a second coding round was then conducted to identify the *process* participants used to form their view about the appropriate care arrangements for the children.[65] The thematic analysis of the data was refined through cross-disciplinary dialogue between the team members and with the project's advisers as themes emerged.[66]

The analysis of the interview responses was then compared to the reasoning in the six judgments whose facts formed the basis of the vignettes, again with a focus on the factors relied on and the process of decision-making, in order to identify areas of commonality and divergence between the two (the comparative analysis).

4.6 Strengths and limitations of the methodology

We expected, and found, that the process employed by participants reflected their knowledge of the child development research and their experience of working with separated families in the family law system. The information which participants provided was, however, constrained by our methodology in a number of ways that have implications for the generalisability of the findings.

First, the vignettes were derived from reported judgments and included findings of fact. Consequently, participants did not begin their consideration of the issues at the point where they would normally start when presented with a parenting dispute. The information that practitioners drew on to make their decisions had already been processed by lawyers, the court and the research team before being presented to participants. While the use of vignettes assisted us to explore the reasoning process that family dispute resolution professionals used for this exercise, this method, of necessity, cannot simulate the interpretative work that these practitioners might engage in day to day practice.[67] The use of vignettes in this way, however, is well suited for the purposes of the project, which is to extract a more considered and elaborate interpretation than might occur in a 'real life' situation, and to do so in a way that explicitly elucidates the reasoning behind the opinion.

Second, participants were asked to identify what they would consider to be 'developmentally sound' arrangements for the children in the vignettes, and to explain the reasons for their opinion. This is a different instruction to the one provided in Pt VII of the Family Law Act, which requires the courts to make orders that are in the child's 'best interests'. The use of the term 'developmentally sound' may have operated to guide participants' consideration of the vignettes in a

way that might not have been the case had they been asked to identify arrangements that were in the child's 'best interests'. The focus on 'developmentally sound' arrangements was deliberately selected as it reflected both the criticisms of the law made by family dispute resolution practitioners in the wake of the 2006 amendments and the concerns raised by lawyers (see Part 2). The use of this term was designed to tease out these concerns by inviting participants to explain their opinions within the bounds of this concept. However, it is important to note that participants' responses to this question were also consistent with their descriptions in the first part of the interview, where they were asked to describe what their 'main aims' would be in working with the parents in the vignette at their service, a question that was not constrained in this way.[68] Moreover, and significantly, participants tended to use the terms 'developmentally sound' (and 'developmentally supportive') and 'best interests' interchangeably when talking about children's care arrangements, signifying that for them these concepts were synonymous in this context.

In the second part of the interview, participants were asked to step outside their usual role and express an opinion about the child's care arrangements.[69] This was unfamiliar territory and a difficult transition for some. Participants' discomfort with the role, however, tended to influence the outcome of their reasoning process -- for example, an unwillingness to commit to a final arrangement[70] -- rather than the process of reasoning itself, and the latter was the area of interest for our project.

A practitioner's interaction with parents in conflict is dynamic and the behavioural cues they rely on during family dispute resolution are diverse. The thoughts and behaviours of the practitioner are constantly responding to and influencing those of a parent or parents. Some participants reported that forming a decided view was difficult in the absence of being able to speak with and observe the parents and their children. A hypothetical scenario cannot mirror the complex and multi-faceted nature of these social phenomena. Jenkins and his colleagues have shown, however, that when using vignettes participants seek to make sense of the scenarios in ways not entirely distinct from how they might seek to make sense of everyday experiences.[71] The plausibility of the vignette is a crucial consideration here, and participants judged the dispute vignettes used in our study to be familiar and typical of the families presenting at their respective services.[72] As one participant noted, '[w]hen I read this story, I felt it sounds like a classic family that we would have'.[73]

A further point to note is that while the vignettes were chosen on the basis they were representative of the issues in litigated parenting matters, there will no doubt be issues affecting a child's development that are not raised by the scenarios in our study. Nevertheless, as mentioned in Part 3, it was not part of our research aim to produce an inventory of the child development research for codification in law, and we make no claims about the comprehensiveness of the developmental considerations that were canvassed in the responses. There is also no empirical way of determining whether our participants' responses reflected their actual reasoning process or a post-hoc explanation of it. Of course, much the same can be said about the reported judgments of the courts.

Finally, the judgments and interviews pre-dated the commencement of the 2012 family violence amendments to Pt VII, and hence the extent to which those reforms have affected practices within the family law system cannot be detected by this stage of our study.[74] It is also important to emphasise that the approach articulated in each of the judgments we used reflects the practices of the particular judicial officer in those particular circumstances. However, none of the cases was the subject of appeal, and as the Full Court has ruled, the 2006 amendments established a decision-making pathway which the courts are required to follow.[75] It is reasonable to assume, therefore, that the approach reflected in the judgments is consistent with the dictates of the legislation.

The following section outlines the key results of the interview analysis.

5 Deciding children's care arrangements

The analysis of the interview responses revealed a high degree of commonality among participants across the different vignettes, both in their reasoning process and the factors that influenced their consideration of developmentally sound outcomes for the children in the various scenarios. There was also a high level of commonality in practitioners'

descriptions of what their aims would be in working with the parents in the vignettes, and a correspondence between these descriptions and the objectives that underpinned their opinions about the children's care arrangements.

As described above, participants were asked in the first part of the interview to describe what their 'main aims' would be in working with the parties in the vignettes if they were clients at their service. Two aims were prominent in the responses to this question. Although many participants prefaced their discussion by noting that securing the child's 'best interests' was their overriding responsibility, their 'first and foremost' aim (as one person put it) was to ensure the children were safe. Closely allied to this was a second goal, which involved ensuring the children's developmental needs were met.[76] Consistent with these responses, the analysis of the reasoning process articulated by participants in the second part of the interview (where they were asked to offer a view about developmentally sound arrangements for the children) revealed that these same objectives -- minimising the risk of harm to the child and ensuring the child's healthy development was supported -- guided their decisions about the children's care arrangements.

Central to the process articulated by participants in the second part of the interview was the performance of three inter-related (and overlapping)[77] assessment tasks: identification of the child's developmental needs, assessment of the risk factors and protective factors affecting the child's safety and development, and an assessment of the parenting and protective capacities of the parents. That is, in reaching their decision about what arrangements were best for the child(ren) in each case, practitioners asked themselves: 'What do these children need?', 'What risks to their wellbeing are present?', and 'Are these parents able to support their children's development and protect them from harm?'

A description of these assessments is provided below. To illustrate how they were applied by practitioners, we have drawn on the interview responses to the *Joanna & Brett* vignette, which was based on the judgment in *Henley & Marple*.[78] To facilitate a better understanding of the quoted extracts from the interviews, a summary of the *Joanna and Brett* vignette is set out here.

The case concerned a dispute between the parents of three children: 12 year old twins and a 10 year old son. The children had been living with each parent on a 'week about' equal time basis for the 3 years since parental separation. Both parents had re-partnered. The father's girlfriend maintained a separate residence. During his week with the children, the father would take the children to stay at his girlfriend's home for several nights; the other nights they spent at his home. The mother was seeking to change this arrangement so that the children could live primarily with her and spend time with the father on alternate weekends. Her proposal was resisted by the father who wanted the existing arrangement to continue. The relationship between the parents was hostile. There was evidence supporting the mother's claim that the father had tried to gain the allegiance of the children by enlisting them to spy on her, including stealing her diary and house keys, and by telling the children that she was responsible for the family breakdown. The mother had recently responded to the children's growing rejection of her by seeking professional assistance to change her parenting approach. The Family Report described the children as aligned with and protective of their father.

5.1 Assessing the children's needs

Identification of the children's needs was central to the opinions participants provided about the children's care arrangements, and was often the starting point for their explanation of these. As one respondent explained, 'The first thing I was doing was I was sort of thinking, "*What do these children need*?"'[79]

For some participants, however, their identification of the child's needs was implicit rather than expressly articulated in their explanation for their decision. For example one practitioner commenced by explaining that in deciding what care arrangements should be ordered for the children, her goal was to reduce their experience of the parents' conflict:

> I mean these poor children are in the situation where there's a heap of conflict going on, so that would be my absolute main aim, is to reduce the children's experience of that conflict.[80]

The assessment of the children's needs was also an individualised process, with a focus on the particular child in the

context of their particular family and personal circumstances. Practitioners incorporated a range of information from the vignette into these assessments, such as information about the child's health, schooling and cultural background, as well as evidence about the child's relationship with the parents and others and the nature of the inter-parent relationship and its impact on the child. The child's age was also an important variable. For example, participants who provided an opinion about the *Joanna & Brett* vignette emphasised the self-esteem and identity-formation needs of the 12 year old twins, noting they were at an age when children are 'mostly thinking about their peers and what's happening in their social life'.[81] In contrast, participants who responded to the *Katie & Steve* vignette (a relocation dispute), where the child was an infant, stressed that this was 'a very, very vulnerable age' developmentally,[82] and emphasised the need to ensure the child's secure attachment to her mother was not disrupted.

5.2 Assessing the level of risk to the children

The second assessment task saw practitioners identify risk factors (or 'red flags') and protective factors (or 'buffers') affecting the child's safety and development. A number of factors familiar to family lawyers were relevant to these assessments. These focused particularly on the child's primary relationships, including the nature of both the parent-child and inter-parent relationships (and especially the nature and level of conflict between the parents), as well as environmental and emotional factors, such as information about the logistics of the existing or proposed care arrangements and the child's capacity to manage these. For example, in their consideration of the *Joanna & Brett* vignette, practitioners identified the demands of the equal time arrangement, and the 'cumulative stress associated with multiple changes' of households,[83] as posing a risk of harm to the children's development:

> There's too much instability in the children's lives, especially too when the children are with the father and the children also move to the father's girlfriend's place. So there is another, one more person and one more environment that the children are introduced to, that's also different. So, in a way, the kids have got three environments for them to actually continuously, week after week, are having to adjust to. So really it's as if these kids just tag along, they don't actually belong anywhere, and that is actually very, very sad. And that would be so detrimental to the kids' development.[84]

Reflecting the kinds of developmental needs identified above, assessments of risk were concerned with a broader range of harms to children's wellbeing than their physical safety, including damage to their identity formation and concerns for their stability needs and experience of security. For example, participants articulated a number of risks to the children's development associated with the father's behaviour in the *Joanna & Brett* vignette, including concerns that the children were not being allowed 'to focus on themselves',[85] and concerns for their moral development. The latter was particularly noted in relation to the older son and daughter (the twins), who had stolen from their mother at their father's request. As one practitioner explained:

> So [the older son] is not going to be feeling too good about the bit of himself that's betrayed the mother. So his whole self, representation of self comes from how he is with his parents and he's been put in an untenable position and so has [the daughter]. So in terms of their moral development, you would really question whether or not that's been undermined by all of that behaviour and how that will play out in their future development.[86]

As this suggests, participants' risk assessments also incorporated predictions about the child's future development if the identified risk factors were not addressed.

In identifying protective 'buffers', participants were looking for positive factors in the child's life that could ameliorate the risks of harm, such as evidence of responsive parenting by one parent that could 'offset' concerns for the child's development associated with the other parent's behaviour, or evidence of a supportive social network for the child. For example, while practitioners noted multiple risks associated with the father's behaviour in the *Joanna & Brett* vignette, they also identified several protective factors in the children's lives, including the presence of the father's girlfriend:

> But the other thing that I thought was quite good in this was he now has a new partner who seems to be having a stable effect on him, and the mum is quite happy to go along with that as long as she knows the children have got somebody on their side kind of thing.[87]

5.3 Assessing the parents' parenting and protective capacities

The third assessment process performed by participants saw them focus on the parenting and protective capacities of the parties. As noted, there was considerable overlap in the assessments of risk and capacity in some scenarios. This is because the behaviour of one parent or the nature of the parents' relationship was often a source of risk to the child's development. It is not possible within the space available here to detail the measures that guided participants' assessments of parenting and protective capacity. That is a matter for another article. For present purposes, they included evidence of the extent to which a parent was 'attuned' to their child's needs and able to separate these from their own interests. They also included a consideration of the extent to which the parent had engaged in authoritative parenting and was modelling positive behaviours for the child.

In their responses to the *Joanna & Brett* vignette, participants expressed serious concerns about the father's parenting capacity. A central issue in their assessments was the evidence that the father was exposing the children 'to some pretty toxic messages'[88] about their mother, and was sharing his feelings about the separation with them. Another key issue affecting assessments of Brett's parenting capacity was the evidence 'of the parent/children role reversal between the dad and children'[89] -- that Brett was 'presenting himself as the victim' and the children were 'parenting dad'.[90] Practitioners identified this behaviour as posing a risk to the children's attachment to their mother, noting that they had already begun to withdraw from her and to align with their father.[91] Participants also assessed Brett's parenting as self-focused rather than child focused, noting his lack of awareness of the children's needs and his apparently greater interest in 'getting back at mum'.[92]

In contrast to these assessments, participants identified Joanna's parenting as a protective factor for the children, indicating that by comparison with the father, she 'seems to be more focused on doing what the boys need':[93]

> The good thing here is mum's got access to some emotional support recently and she's made use, I think, of some pretty good processes to inform her in how to respond to the children and this rejection of her. She's been able to go in and be an active parent and actively tell them how to understand the rules and how to be good so they can actually succeed with her.[94]

Importantly, participants' assessments of parenting capacity also included predictions about the prospects of behavioural change through the use of therapeutic interventions or educational services, such as counselling, anger management and parenting programs. In several scenarios this led some practitioners to make 'interim' arrangements for the children's care, so as to give a parent the opportunity to improve their parenting capacity and thereby reduce the level of risk to the child. In other cases, however, participants invoked their experience of working with families to suggest that the prospects of improvement were likely to be minimal and slow, and the risks to the child of waiting too great.

This divergence played out in the responses to the *Joanna & Brett* vignette. While most of the respondents decided the equal time arrangement should be abandoned as a matter of urgency, several practitioners decided to defer any change for the time being and give the father an opportunity to improve his parenting capacity with the help of therapeutic and educational support services.

As noted above, participants used their assessments of needs, risk and capacity to support and explain their opinions about the 'best' care arrangements for the children in the particular scenario. The following extract from one of the *Joanna & Brett* interviews illustrates how these assessments informed this participant's decision that the children should live with their mother. The participant had identified the children as needing 'stability' and 'boundaries'. She described the existing week-about arrangement, which required the children to move between three homes every 2 weeks, and the father's alienating behaviours, as posing serious risks to the children's mental health, which could see them 'end up being in the juvenile justice system or substance abuse' if they continued. The participant had assessed the mother's parenting capacity positively, noting that, unlike the father, she had provided 'good structure around them, such as rewards for good behaviour, independence, responsibility'. Having conducted these assessments, she went on:

> Because of all those issues I mentioned before, [the current arrangement] cannot continue ... So I need to start looking at what's best for the kids because the kids are starting to be damaged really. So I would actually be looking at who are the parents that could provide that stability, the stability, the structure, the routine that the children need. Yeah, and the time too, to be able to spend, to provide the kids [with] all of what they need. I would actually say I will, from this scenario, I would have the kids staying with the mother.[95]

6 A comparison with decision-making under Pt VII

As expected, the comparative analysis confirmed the existence of different approaches to deciding care arrangements for children, as well as some different messages about children's care needs. However, it also revealed the significant extent to which family relationships professionals and the courts look to the same factors to determine a child's best interests in the post-separation context. This is particularly so of the more traditional parts of the legislative framework. Issues that were central to decision-making by both family relationships professionals and judges included the child's views (s 60CC(3)(a)), the child's age (s 60CC(3(g)), the nature of the child's relationship with each parent (s 60CC(3)(b)), and the likely impact on the child's wellbeing of changing the existing care arrangements (s 60CC(3)(d)). The comparative analysis also showed that some of the provisions that were added in 2006 were also significant for family dispute resolution practitioners. In particular, the factors set out in s 65DAA(5)(c) and (d), which ask the court to have regard to the capacity of the child's carers to communicate with one another, and to the impact that a proposed arrangement might have on the child, were important considerations for our Stage 1 participants.

On the other hand, several notable differences between the interview responses and the judgments were evident. These are discussed below. The main differences concerned the process of decision-making itself, the objectives of the exercise, and the understanding of harm to children's development.

6.1 A less complicated decision-making process

The differences between the approach used by participants to reach their decisions and the process that judicial officers are required to follow can be illustrated if we compare the 2011 judgment in *Carlyle & Muldoon*[96] with participants' responses to the *Sally & Ray* vignette, which was based on this case. The case concerned the mother's application to move with the parties' two children to a location approximately 2 hours' drive from the father's rural home, where the family lived prior to separation. Since separation, the children (aged 10 and 7) had been living with their mother in a nearby country town and spending alternate weekends with their father on the farm, which they enjoyed. The older child had been diagnosed with Attention Deficit Disorder (ADHD) and Autism Spectrum Disorder (ASD) and prescribed medication for these conditions. The father was suspicious of this diagnosis and refused to give the child his medication while he was in his care. The mother said she was 'miserable' living in the small country town where she felt she was under the scrutiny of the local community and the father's extended family, and had been seeing a counsellor for depression for some time. The father remained angry at her for ending the marriage and opposed her move.

6.1.1 The judgment in *Carlyle & Muldoon*

Primary best interests considerations

After a 5 page summary of the relevant law, Justice O'Reilly assessed the evidence of the two 'primary considerations' in s 60CC(2). In relation to the first of these considerations she found, on the basis of the family report writer's opinion, that 'the children's meaningful relationship with the father would not be disturbed' if they were to relocate with their mother. [97] In respect of the second primary consideration in s 60CC(2)(b), Justice O'Reilly accepted evidence that the father could not be relied on to provide the older child with his medication, which could have a 'highly prejudicial impact' on the child's wellbeing. [98]

Additional best interests considerations

Her Honour then assessed the 'additional considerations' in s 60CC(3). In relation to these, she found the mother had

been 'diligently attentive' to the older child's special needs, whereas the father was 'self-focused' and had shown little ability to understand the child's health issues,[99] but that the children 'enjoyed the father's company' and had a significant attachment to him.[100]

Presumption of equal shared parental responsibility

Justice O'Reilly then considered s 61DA and whether the presumption of equal shared parental responsibility applied. On the basis of her findings in relation to the best interests factors, and her acceptance of the family report writer's view that the relationship between the parents was 'toxic', she concluded it would be best for the children if the mother had sole responsibility for making decisions about the children's health and education. [101] She made orders for equal shared parental responsibility in relation to all others aspects of parental responsibility.[102]

Equal time considerations

As she had made an order for equal shared parental responsibility, Justice O'Reilly proceeded to consider the various provisions of s 65DAA. As required, she first considered whether an equal time arrangement was in the children's best interests in accordance with s 65DAA(1)(a). In assessing this question, she noted the family report writer's evidence of the parents' hostile relationship and inconsistent parenting styles, concluding that 'the level of discord between the parties and the children's need for consistency' meant they 'should live primarily with one parent and spend time with the other parent'. Her Honour nevertheless went on as required by the High Court's ruling in *MRR & GR*[103] to consider whether an equal time arrangement would be 'reasonably practicable' under s 65DAA(1)(b), both in the context of the mother continuing to live near the father and in the context of her relocating. After considering the various criteria for determining this question in s 65DAA(5), including the evidence of the parents' toxic relationship, she concluded that an equal time arrangement was not reasonably practicable in the circumstances and should not be ordered.

Substantial and significant time considerations

Justice O'Reilly next considered s 65DAA(2)(c) and whether an arrangement for 'substantial and significant time' with each parent, including weekdays and weekend time in each home, would be in the children's best interests. In this section of her judgment, she referred again to the family report writer's views about the children's need for consistent care and the parties' toxic relationship, concluding that an order for substantial and significant time with each parent would not be in the children's best interests. She then examined, as required by s 65DAA(2)(d), the question of whether an arrangement for 'substantial and significant time' with each parent would be reasonably practicable. Repeating her earlier findings about the parents' inability to communicate, she decided that a substantial and significant time arrangement would not be reasonably practicable in the circumstances and should not be ordered.

The 'best interests' decision

Having traversed all of the requirements of s 65DAA, Justice O'Reilly noted she was then 'free' to make such orders as she considered were in the children's best interests. [104] At this point she referred once more to the evidence and findings on the various checklist factors, noting that the mother had been the children's primary carer, that the father lacked insight into the older child's medical needs, and the family report writer's opinion that the mother was better able to meet the children's needs. She also accepted the mother's evidence that she was 'miserable' living in the small country town where she felt 'under scrutiny' from her in-laws, and repeated her finding in relation to the first primary best interests consideration that the children's 'meaningful relationship' with their father would not be damaged by spending less time with him. On the basis of these findings her Honour concluded the children's best interests would be met by an order that they live with their mother in the city to which she wished to move.

In summary, the judgment reveals the following 10 decision-making steps:

1. Assess the primary best interests considerations
2. Assess the additional best interests considerations
3. Decide whether the presumption of equal shared parental responsibility applies
4. Examine whether the children spending equal time with both parents is in the children's best interests
5. Examine whether the children spending equal time with both parents is reasonably practicable

6. Decide whether to make an order for equal time
7. Examine whether the children spending substantial and significant time with both parents is in the children's best interests
8. Examine whether the children spending substantial and significant time with both parents is reasonably practicable
9. Decide whether to make an order for substantial and significant time
10. Decide what arrangements are in the children's best interests

6.1.2 Participants' responses to the same scenario

Participants' responses to the *Sally & Ray* vignette, which was based on the facts of *Carlyle & Muldoon*, employed the three assessment tasks described in Part 5. Although there was no uniform sequencing to these tasks, their process of reasoning involved the following four elements:

1. Identification of the children's needs;
2. Assessment of the risk factors and protective factors affecting the children's safety and development;
3. Assessment of the parents' capacity to meet the children's needs and protect them from harm;
4. Using the assessments to decide what arrangements will best support the children's development and minimise the risks of harm.

A brief summary of how these elements operated in the responses to the *Sally & Ray* dispute is provided below.

Identifying the children's needs

Participants focused on a number of features of the vignette to determine the needs of the children involved. The main factors here were the young age of the children, the older child's medical condition, and the children's existing care arrangements, including their history of being cared for by their mother and growing up in close proximity to members of their extended family. On the basis of these considerations, participants identified the children as needing stability and consistency of care, and indicated the particular importance of this for the older child because of his health issues. Although different language was used by different practitioners, each also identified the children as needing to be free to enjoy the company of both parents without having to feel they were being disloyal to one of them. Practitioners also identified the children as needing to maintain a relationship with both parents, and to maintain their connections to their extended family and each other.

Assessing the level of risk to the children's safety and development

Participants identified several sources of risk to the children on the facts of this scenario. These included the parents' inability to communicate with one another, the father's unwillingness to give his son his medication, and the father's unresolved anger at the mother for ending the marriage, which he had shared with the children. Several people predicted that the children's secure attachment to their mother would be damaged if they continued to be exposed to the father's constant denigration of her. Another potential risk identified by participants was the significant travelling time that relocation would involve if the children wanted to spend weekends with their father on the farm.

Practitioners also identified some protective factors in the children's lives, including the mother's demonstrated capacity to respond to their needs, their sibling relationship, and their extended family network. A further 'buffer' noted by participants was that the children enjoyed spending time with their father on the farm, and wanted that to continue.

Assessing the parenting and protective capacities of the parents

Participants expressed a number of concerns about the father's parenting, including his attitude to his son's medical needs, his failure to recognise that this behaviour was causing his son anxiety, and his inability to support the children's relationship with their mother. Practitioners canvassed the possibility that the father's capacity might be improved through counselling and a parenting course. However, on the basis of their professional experience and the length of time the father had remained 'stuck' in his anger at the mother, most participants concluded the father was unlikely to

'make the shifts that you would need to, to do the sort of parenting that would be healthy psychologically for the kids'.[105]

Some participants also raised concerns about the mother's depression and its potential impact on her caregiving capacity, but predicted that a move away from the area was likely to give the children 'a mother who is feeling happier about herself'.[106] Overall, practitioners assessed her as being more capable than the father of protecting the children's development and responding to their needs, highlighting her proven commitment to her son's health care needs and her history of facilitating the children's relationship with the father and his family.

Deciding developmentally supportive and safe care arrangements

Participants drew on these assessments to articulate the arrangements they thought would best support the children's development. Like Justice O'Reilly, most respondents decided the children's best interests would be promoted if the children lived with their mother and the mother was permitted to move.[107] The following annotated response illustrates how this process played out for one participant using the three assessments:

> I would say that given that the child has been diagnosed and is on medication [*need*], and the dad's unwillingness to maintain it [*parenting capacity/ risk factor*], they should be with the mum, but they really enjoy the time with their dad [*protective factor*] and they need the time to have with their dad [*need*] so I would be supportive of the mum moving and having responsibility for making decisions about their medical and their schooling, but that they would, it would be in their best interests to have half of the school holidays and each second weekend with their dad [*protective factor*]. ... The siblings need to be together [*need/protective factor*] so I really would never consider separating the siblings [*risk factor*]. ... And the medication is the biggest thing in there, is that he needs, Lewis needs that medication [*need*] and if dad's not willing to give it to him [*risk factor*], I don't -- you know, you can order it but ... And if he didn't, if he was ordered to do it and he didn't do it, then I would say, as hard as it is, that that child can't see his dad unless they can trust the child to monitor his own medication and take it each day.[108]

6.2 Different objectives

As noted in Part 5, practitioners articulated their foremost aim in working with parents as ensuring the children are safe. The emphasis that participants placed on minimising harm to children is consistent with the priority given to this issue in Pt VII, particularly since the enactment of the family violence amendments in 2012. However, the second goal they identified -- ensuring the child's development is supported -- is not explicitly recognised in the legislation. Instead, what have come to be known as the 'twin pillars' of the decision-making framework in Pt VII couple the concern for child protection with an emphasis on the benefits to children of having a meaningful relationship with both of their parents.[109]

The distinction between these differently paired objectives can be illustrated by comparing participants' responses to the *Joanna & Brett* vignette, discussed in Part 5, with the judgment in *Henley & Marple*,[110] on which this vignette was based. As noted earlier, a central concern for the practitioners who responded to this vignette was the father's alienating behaviour, which participants assessed as posing a serious risk to the children's attachment to their mother and their own mental health. As mentioned in Part 5, participants were also concerned the children were 'parenting dad', and that they had been enlisted by him to spy on their mother. The judge in *Henley v Marple*, Justice Cohen, identified similar concerns in his judgment, finding that:

> the relationship between the husband and the children is close but not good. They feel responsible for him and promote what they feel to be his welfare in preference to their own. He parents them as though he is their child, caring for his needs in preference to theirs. This is a harmful and destructive situation for the children to be in.[111]

As noted in Part 5, participants in our study considered the children's development would be damaged if they continued to be in the father's care (absent significant improvement in his parenting and protective capacity), and assessed the mother as having the greater capacity to support the children's needs. On this basis, the majority of practitioners who responded to this vignette decided the children's best interests would be best served if they lived with the mother and

spent more limited time with their father.

The judge in *Henley v Marple*, on the other hand, was required by the legislation to regard the benefit to the children of having a meaningful relationship with both parents as a primary consideration. As a consequence, he found that:

> Equally shared residency will best allow a meaningful relationship between the children and each parent despite the strong possibility that continuing this level of involvement with the children will permit [the father] to continue to align the children with himself and alienate them from the wife.[112]

This response suggests that, at least prior to the introduction of s 60CC(2A),[113] the primary considerations in Pt VII might lead the courts to find that a parent-child relationship is 'meaningful' even when the parent's behaviour is 'destructive' -- rather than supportive -- of the child's development. In contrast to this tension, the guiding objectives articulated by the practitioners in our study involved a more complementary set of aims.

6.3 A broader understanding of harm

The third notable difference between the decision-making framework in Pt VII and the interview responses involves the understanding of what constitutes a risk of harm to the child. The second of the primary considerations in Pt VII (and the one that must now be given greater weight)[114] requires the courts to protect the child from harm caused by 'being subjected to or exposed to abuse, neglect or family violence'.[115] As noted above, the family relationship practitioners in our study were guided by a similar concern to minimise harm to the child. However, in doing so, participants incorporated a broader range of risks to the child's development than is arguably reflected in the present legislative framework for assessing children's best interests.[116]

Importantly, the approach described by participants explicitly recognises the inter-parent relationship as a potential source of harm to children's development. As noted in Part 5, participants responded to the question about their 'main aims' in working with the parents in the scenarios by identifying the need to ensure the children are safe and that their healthy development will be supported. Within the context of their work, practitioners described operationalising these aims by educating parents about their children's developmental needs and, in particular, about the negative effects of parental conflict on children. This understanding of conflict as a risk factor was also evident in participants' responses to the second part of the interview. In contrast to this concern with the effect of conflict on the child's wellbeing, the legislation currently only requires the courts to consider the nature of the parents' relationship with one another when deciding whether a shared time arrangement is 'reasonably practicable'.[117]

7 Implications for our research questions

What are the implications of these insights for harmonising the system's messages about children's care needs, and for producing a less complex and more responsive decision-making framework for parenting disputes? In this section we argue that there are at least three findings from the project to date that may offer a way to address the problems identified in the introduction to this article.

7.1 No need for a complicated decision-making framework

The first message concerns the potential for simplification of the legislation. In his 2010 address, Rick O'Brien suggested there was 'a lot to be said for revisiting' the earlier incarnations of Pt VII, and simply providing 'a list of matters the court should take into account' in considering what orders to make.[118] Richard Chisholm has recommended a similar reform.[119] Our comparative analysis lends support to these proposals. Importantly, it showed that there are many similarities between the factors considered by family relationships professionals and those found in the legislation. Significantly, however, the approach articulated by our Stage 1 participants focused more directly on using these considerations to achieve the goals of minimising harm and supporting the child's healthy development, without the need to consider whether particular kinds of care arrangement might fulfil those aims. As illustrated by the

responses to the *Sally & Ray* vignette, practitioners were able to reach a decision about the children's care arrangements -- the same one that was reached by the court -- without the associated problems identified above.

It is worth noting here that much the same can be said about judicial officers. The examination of the judgment in *Carlyle v Muldoon* shows that the judge in that case had already made each of the findings that she ultimately relied on to support her decision *before* going on to address the various limbs of s 65DAA. In other words, the extra considerations mandated by that section did not alter the court's decision in that case; they simply added to the length of the judgment.

7.2 A need to recognise that conflict can be harmful

The second message from the comparative analysis concerns the way in which it both reinforces the priority accorded in Pt VII to protecting children from harm and suggests the need for a broader understanding of the sources of harm to children's development. It is important that we do not take any reform step that would dilute the long overdue message in the legislation about the prevalence and effects of violence among clients of the family law system,[120] or the kinds of behaviour that constitute family violence. But it is also important that the potential for harm to children's development from exposure to parental conflict, which is common in post-separation disputes, is not marginalised.

This issue has been the subject of critical scholarship elsewhere, most notably by Chisholm.[121] In his 2012 David Opas Memorial Lecture, Professor Chisholm noted that the then government's response to the Hull Committee report, which gave rise to the 2006 amendments, rejected its recommendation that 'entrenched conflict' be regarded as a basis for rebutting the presumption of shared parental responsibility.[122] Our study suggests that while a reference to damaging parental conflict may have been omitted from the legislation, it remains central to child-focused practice in the family relationships sector.[123] The interview responses indicate that where such conflict exists, there is, for professionals in this sector, a risk to the child's development that must be factored into the consideration of the child's care arrangements.

At present there is no best interests factor in Pt VII which reflects this concern, and the courts are only required to consider the nature of the relationship between the parents when deciding whether a shared time arrangement is 'reasonably practicable'.[124] In Richard Chisholm's view, the government's decision to omit a reference to parental conflict in Pt VII was 'regrettable', and has 'compromised the way the Act treats the determination of the child's best interests'.[125] Our comparative analysis suggests that it may also have contributed to clients being given different messages about their children's care needs in different parts of the service system.

7.3 The centrality of parenting capacity

The third message from the comparative analysis concerns the importance that family relationship professionals placed on the parenting and protective capacities of the parents. Central to the process employed by our Stage 1 participants to reach their decisions was a view that children's healthy development is crucially linked to the capacity of the adults who care for them to respond to their needs in a way that supports their development. At present this understanding is not explicitly recognised in Pt VII, which pairs the concern for children's safety with the benefits of a meaningful relationship with both parents. It is worth emphasising here that practitioners' focus on responsive parenting was consistent with their aim of minimising the risk of harm to children. That is, parenting that is responsive to the child's needs is, by definition, protective. In contrast, as the judgment in *Henley & Marple* illustrates, the present primary considerations in Pt VII can sometimes pull decision-makers in opposite directions, which is why the tie-breaker provision in s 60CC(2A) needed to be introduced.

8 Conclusion

The evaluations of the 2006 amendments to Pt VII revealed the existence of inconsistent messages about children's care needs across the broader family law system, and suggested that the new law had played a role in producing this effect.

They also indicated a level of discontent with the legislation among the system's different professional communities, and highlighted the practice difficulties for lawyers and judges associated with its complex decision-making framework. Our study is aiming to draw on the experiences of these professional communities to inform the development of a new framework for considering children's care arrangements, one that is structurally simple, supportive of children's development, and capable of application by the range of practitioners across the system's different dispute resolution sites.

The analysis of the project's Stage 1 responses suggests that while the factors that informed participants' opinions resemble the existing considerations in Pt VII, there are some important differences of approach which point to ways in which the current framework might be modified to enhance its consistency with the messages emanating from the family relationships sector. The analysis also suggests the present legislation could be simplified without compromising the outcomes for children. Of course, while the organic and iterative process of reasoning revealed in the interviews came easily to practitioners who could bring their understanding of children's developmental needs to the relevant assessments, it may work less well in the hands of legal advisers and the courts, who have a range of different obligations,[126] and who must accommodate the procedural requirements of litigated disputes.[127]

The extent to which the insights from Stage 1 are transferable to legal and court practice is the subject of investigation in Stage 2 of the project. In this stage we are also examining the day to day experiences of lawyers and judges who use Pt VII to advise clients and make decisions about children's care arrangements, to gain an up to date picture of how Pt VII is affecting legal practice four years after the AIFS report. A number of recent presentations, including by the Chief Justice of the Family Court, suggest that the complexities canvassed in the AIFS evaluation continue to vex legal practice, and as Chisholm has argued, the judges of the family courts who face crowded lists and hard-fought cases should 'not have to waste time trying to sort out a tangle of legal provisions' in addition to the dispute itself.[128] Whether this remains a problem for the legal profession, and whether the information we gathered in Stage 1 about the practices of family relationships sector practitioners can help to generate a more coherent set of messages about children's needs, remains to be seen.

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1 See, eg, Attorney-General's Department, 'Building Better Partnerships Between Family Relationship Centres and Legal Assistance Services', *Media Release*, 4 December 2009; Australian Law Reform Commission (ALRC) and New South Wales Law Reform Commission (NSWLRC), *Family Violence -- A National Legal Response: Final Report*, ALRC Report 114/ NSWLRC Report 128: October 2010; Family Law Council, *Improving the Family Law System for Clients from Culturally and Linguistically Diverse Backgrounds*, 2012, Ch 5.2.

2 R Kaspiew, M Gray, R Weston, L Moloney, K Hand, and L Qu, *Evaluation of the 2006 family law reforms*, Australian Institute of Family Studies, 2009, p 109.

3 See on this, L Moloney, R Kaspiew, J De Maio, J Deblaquiere, K Hand and B Horsfall, *Evaluation of the Family Relationship Centre legal assistance partnerships program: Final report*, Australian Institute of Family Studies (AIFS), March 2011.

4 The 2006 amendments to Pt VII were effected by the introduction of the Family Law Amendment (Shared Parental Responsibility) Act 2006 (Cth). The majority of its provisions came into operation on 1 July 2006.

5 See Kaspiew et al, 2009, above n 2, pp 214-15, and 335-6.

6 See R Kaspiew, M Gray, L Qu, and R Weston, 'Legislative aspirations and social realities: Empirical reflections on Australia's 2006 family law reforms' (2011) 33 *J Soc Wel & Fam L* 397. See also J Dewar, 'Can the centre hold?: Reflections on two decades of family law

reform in Australia' (2010) 24 *AJFL* 139; H Rhoades, 'Working with separated families' in R Sheehan, H Rhoades & N Stanley (Eds), *Vulnerable Children and the Law: International Perspectives on Challenges to Child Welfare, Child Protection and Children's Rights*, Jessica Kingsley Publishers, London, 2012, Ch 18, pp 325-6.

7 Kaspiew et al, above n 2, pp 206, 214-15.

8 See R O'Brien, Deputy Chair, Family Law Section of the Law Council of Australia, 'Simplifying the System: Family Law Challenges -- Can the System ever be Simple?', Paper presented to the 2nd Family Law System Conference, Canberra, 20-21 July 2010 (copy on file with the authors). O'Brien notes (p 3) that the decision-making framework in Pt VII includes 'not just *factors* but possible *results* which the court is mandated to consider'.

9 Kaspiew et al, above n 2, Summary report pp 12-13.

10 Ibid, p 335.

11 Family Law Act 1975 (Cth) (FLA) ss 61DA and 65DAA. The presumption of equal shared parental responsibility can be displaced if there are reasonable grounds to believe that a parent has engaged in child abuse or family violence and can be rebutted if the court finds that shared parenting is not in the child's best interests in the circumstances: s 61DA(2) and (4). The meaning of a 'substantial and significant' care time arrangement is set out in s 65DAA(3).

12 FLA s 60(CC)(2)(a).

13 FLA s 60(CC)(2)(b).

14 FLA s 60I(1) and Family Law Rules 2004 (Cth), Pt 2 Sch 1. Families are exempted from the requirement to attempt family dispute resolution and produce a certificate where there is a history or risk of family violence or child abuse: s 60I(9).

15 For a description of the background to the establishment of the Family Relationship Centres see, P Parkinson, 'Keeping in Contact: Family Relationship Centres in Australia' (2006) 18 *Child and Family Law Quarterly* 157.

16 For example, the AIFS evaluation showed that family dispute resolution programs were producing high levels of durable agreements, and that many parents found the process of family dispute resolution empowering: see Kaspiew et al, above n 2, pp 104, 110.

17 See above n 6.

18 O'Brien, above n 8, at 3 (emphasis in original).

19 *Goode v Goode* (2006) 206 FLR 212; 36 Fam LR 422; (2006) FLC 93-286; [2006] FamCA 1346. See also, the Hon Chief Justice Diana Bryant AO, 'An Australian Perspective on the Family Justice Review', Paper presented at the 2012 International Family Law Lecture, London, 1 May 2012, p 11 (copy on file with authors).

20 Kaspiew et al, 2011, above n 6, pp 400, 408-9. See also H Rhoades, H Astor, A Sanson and M O'Connor, *Enhancing Inter-Professional Relationships in a Changing Family Law System: Final Report*, The University of Melbourne, Melbourne, May 2008, p 9; L Moloney and J McIntosh, 'Child-Responsive Practices in Australian Family Law: Past Problems and Future Directions' (2004) 10 *Jnl of Family Studies* 71.

21 H Rhoades, H Astor and A Sanson, 'A Study of Inter-Professional Relationships in a Changing Family Law System' (2009) 23 *AJFL* 11 at 20.

22 M Wright, 'Best Interests, Conflict and Harm -- A Response to Chisholm and Parkinson' (2008) 22 *AJFL* 72.

23 Kaspiew et al 2009, above n 2, pp 335-6; Kaspiew et al 2011, above n 6, p 410; O'Brien, above n 8.

24 Kaspiew et al 2009, above n 2, p 212; Kaspiew et al 2011, above n 6, p 410.

25 Kaspiew et al 2009, above n 2, pp 212-13.

26 The Family Law Legislation Amendment (Family Violence & Other Measures) Act 2012 (Cth) commenced operation on 7 June 2012. Underpinning its introduction was a message that the 'safety of children' must be the 'top priority' for the family law system: Australian Government Attorney-General, 'Family Violence Reforms Passed by Parliament', *Media Release*, 24 November 2011. According to the government, this message was deemed necessary because of evidence that a number of the 2006 amendments had led to community misperceptions of the law which detracted from an appropriate focus on child safety: Australian Government, Exposure Draft Family Law Amendment (Family Violence) Bill 2010 Consultation Paper, November 2010, at [4].

27 Note however that the family violence amendments achieved greater consistency with the practices of professional advisers in the domestic violence sector and with state and territory domestic violence laws: see ALRC and NSWLRC, *Family Violence -- A National Legal Response: Final Report*, ALRC Report 114/ NSWLRC Report 128: October 2010.

28 O'Brien, above n 8.

29 R Chisholm, 'Simplifying the Family Law Act: Saying Less, and Saying it Better' (2011) 21(3) *AFL* 11.

30 R Chisholm, *Family Courts Violence Review*, 2009, Recommendation 3.4.

31 See, eg, J Fortin, J Hunt and L Scanlan, *Taking a longer view of contact: The perspectives of young adults who experienced parental separation in their youth*, University of Sussex, East Sussex, 2012; B Fehlberg, C Millward and M Campo, 'Shared post-separation in 2009: an empirical snapshot' (2009) 23 *AJFL* 247.

32 See M F Brinig, 'Substantive Parenting Arrangements: The Tragedy of the Snipe Hunt', SSRN paper posted 14 March 2013, p 1.

33 Compare E Scott and R Emery, 'Gender Politics and Child Custody: The Puzzling Persistence of the Best Interests Standard', *Columbia Law School Public Law & Legal Theory Working Paper Group*, Paper No 13-352, 6 June 2013.

34 This issue is discussed further below.

35 C Huntington, 'Neuroscience and the Child Welfare System' (2012) 21 *J L & Pol'y* 37 at 51-6; M King and C Piper, *How the Law Thinks about Children*, 2nd ed, Arena, 1995, pp 136-8.

36 See for this description, R Chisholm, 'Children's Best Interests, Parental Involvement and Protection from Violence: Reviewing the Family Law Legislation', David Opas Memorial Lecture 2012, p 5 (copy on file with authors).

37 The researchers are grateful to one of the reviewers for raising this question.

38 Rhoades et al 2008, above n 20, p 49; Rhoades et al 2009, above n 21.

39 Rhoades et al 2008, above n 20, pp 19-21.

40 Kaspiew et al 2009, above n 2, at 110.

41 Ibid, at 109.

42 University of Melbourne Ethics Approval No 1136289.1.

43 University of Melbourne Ethics Approvals Nos 1339232.1; 1339232.2; and 1339232.3. The analysis of the roundtable data and collection of questionnaire responses were not yet complete at the time of writing.

44 The sample of participants comprised 6 practitioners from the Family Mediation Centre in Moorabbin, Victoria; 5 practitioners from Interrelate in regional New South Wales; 4 from Anglicare Western Australia, 6 from the Family Life Family Relationship Centre in Frankston; 7 from Unifam Counselling and Mediation in Parramatta, NSW; 6 from different suburban locations of Relationships Australia Victoria; and 5 from Upper Murray Family Care in country Victoria.

45 Of this group, 7 were currently working as child counsellors or child consultants, and 14 of the remaining practitioners had direct experience working with children in family disputes as child counsellors or child consultants. Child inclusive practice was part of the service provided at each organisation sampled.

46 See for a discussion of the diversity of qualifications and experience among professionals working in the family relationships services sector, Rhoades et al, 2008, above n 20, pp 7-8.

47 The cases were selected prior to the commencement of the Family Law Legislation (Family Violence and Other Measures) Amendment Act 2012 (Cth).

48 See Kaspiew et al 2009, above n 2, p 341. (Table 15.1: $\geq$ 14% of cases judicially determined: parent's assertion of family violence, need to protect children from harm and neglect, parent's facilitation of child's relationship with other parent; benefit of meaningful relationship with parents, views expressed by the child, capacity of parents to meet child's needs and impact of substance abuse on that capacity; parental history of time spent with the child.)

49 See Kaspiew et al 2009, above n 2, p 110.

50 In the initial part of the interview participants were asked whether the issues raised by the vignette were typical of the disputes seen by their service. The interview questions are described below.

51 The more plausible the vignette the better able is the interviewee to imagine him- or herself in the situation. This, in turn, tends to generate a detailed interpretation of the scenario and rich data: N Jenkins, M Bloor, J Fischer, L Berney, and J Neale, 'Putting it in Context: The Use of Vignettes in Qualitative Interviewing' (2010) 10(2) *Qualitative Research* 181 at 186.

52 The interview schedule used for the pilot interviews consisted of two open-ended questions: 'What advice would you give to the parents/parties in this dispute about the proposed arrangements for the children?', and 'What factors were important for you in deciding to give this advice?' As a result of the pilot interviews, the interview schedule was modified to include questions about the participant's current work practices and to ask participants to provide an opinion and an explanation of how they formed it, rather than advice to clients. The final interview schedule is described below.

53 *Carlyle & Muldoon* [2011] FamCA 51; BC201150069.

54 *Benelong & Elias* [2009] FamCA 1312.

55 *Henley & Marple* [2009] FamCA 948; BC200950843.

56 *Seaford & Seaford* [2007] FamCA 1460; BC200750014.

57 *Vaughn & Vaughn & Scott* [2010] FMCAfam 863; BC201007883.

58 *Beale & Beale* [2011] FMCAfam 305; BC201104356.

59 R Ajjawi and J Higgs, 'Using Hermeneutic Phenomenology to Investigate How Experienced Practitioners Learn to Communicate Clinical Reasoning' (2007) 12(4) *The Qualitative Report* 619; J M Morse and P A Field, *Qualitative Research and Evaluation Methods*, 3rd ed, Sage, Thousand Oaks, USA, 1995.

60 The majority of participants (n = 35) provided opinions on two vignettes. Due to issues of time and availability, 4 participants provided an opinion in relation to one vignette only, and 4 participants agreed to provide an opinion on a third vignette at a later date to ensure we received sufficient responses to each scenario.

61 The Research Assistant for Stage 1 of the project, Dr Deborah Keys, had a background in conducting qualitative sociological research in the community welfare sector, primarily in the areas of youth homelessness and domestic violence. She had not previously worked in the family law system and was not known to the interviewees.

62 Participants were provided with a copy of the Plain Language Statement prior to agreeing to participate in the project.

63 The research team for Stage 1 combined disciplinary expertise in law, psychology and sociology.

64 The project's expert advisers for this purpose were Professor Ann Sanson from the University of Melbourne, who brings expertise in developmental psychology; Dr Jacqueline Beall, Senior Family Consultant (Professional Development) at the Family Courts, who brings expertise in developmental psychology and infant-parent attachment; and Ms Pam Hemphill, Principal of Child Dispute Services at the Family Courts, who brings expertise in child assessments for the family courts and a background in child welfare practice.

65 Coding of the factors and process was conducted manually.

66 See on this process, Ajjawi and Higgs, above n 59.

67 Jenkins et al, above n 51, at 179.

68 They were also consistent with the kinds of assessment framework used to safeguard children's wellbeing in the broader child welfare field. See, eg, H Cleaver, I Unell, and J Aldgate, *Children's Needs -- Parenting Capacity*, 2nd ed, TSO Blackwell, London, 2011, p 18.

69 See on the different approaches to neutrality within the family dispute resolution sector, Rhoades et al 2008, above n 20, at 7-8.

70 Some participants adopted a 'trial and review' approach, giving parties an opportunity to improve their parenting capacity before making a final decision about the child's care arrangements.

71 Jenkins et al, above n 51, at 192.

72 Note however that while participants who responded to the *Victor & Sara* vignette said that the issues in the dispute were typical of those they worked with in their organisation, they found that the case itself would not have been assessed as suitable for family dispute resolution.

73 SR4.

74 Questions about the impact on practice of the 2012 amendments were included in Stage 2 of the project.

75 *Goode v Goode* (2006) 206 FLR 212; 36 Fam LR 422; (2006) FLC 93-286; [2006] FamCA 1346.

76 The issue of parental conflict and its relevance to the responses of family dispute resolution practitioners is discussed in more detail in Part 6.

77 For example, assessments of parenting capacity formed part of the assessment of risk factors and protective factors. However, parenting capacity was also considered separately by participants.

78 *Henley & Marple* [2009] FamCA 948; BC200950843.

79 JB8.

80 JB8.

81 JB5.

82 KS2.

83 JB9.

84 JB11.

85 JB8.

86 JB7.

87 JB9.

88 JB4.

89 JB1.

90 JB2.

91 This is a good example of the overlap between the assessments of risk and parenting capacity.

92 JB10.

93 JB10

94 JB7.

95 JB11.

96 *Carlyle & Muldoon* [2011] FamCA 51; BC201150069.

97 Ibid, at [74]-[76].

98 Ibid, at [91]-[95].

99 Ibid, at [152]-[154], [169].

100 Ibid, at [155].

101 Ibid, at [186]-[188].

102 For a recent discussion of the court's capacity to make orders for equal shared parental responsibility in relation to 'some, but not all' issues of parental responsibility, see *Pavli & Beffa* (2013) 48 Fam LR 677; [2013] FamCA 144; BC201303274 at [24]-[29].

103 *MRR & GR* (2010) 240 CLR 461; 263 ALR 368; [2010] HCA 4; BC201000969.

104 Ibid, at [241].

105 SR2.

106 SR3.

107 N = 8/12. All 12 participants decided that the mother should be the primary caregiver. Three respondents were of the opinion that the children's stability needs would be best met if they and the mother remained living in the local area. One person was not willing to offer a concluded view about the relocation without further information about the mother's new partner.

108 SR7.

109 This is reflected in both the objects provision and the 'primary' considerations: FLA ss 60B(1)(a); 60CCC(2)(a). For the genesis of the 'twin pillars' terminology, see *Mazorski v Albright* (2007) 37 Fam LR 518 at 526; [2007] FamCA 520. See also Chisholm, above n 30, p 127; Kaspiew et al 2009, above n 2, p 347.

110 [2009] FamCA 948; BC200950843.

111 Ibid, at [83].

112 Ibid, at [76], [97] and [98].

113 The case was decided in 2009.

114 FLA s 60CC(2A).

115 FLA s 60CC(2)(b).

116 See for a similar critique, Chisholm, above n 30, p 127. Note that the 2012 family violence amendments broadened the range of behaviours that are included within the definition of 'family violence' for the purposes of s 60CC(2)(b): see FLA s 4AB. However, considerations of parental conflict are arguably not addressed by the list of behaviours in this definition.

117 FLA s 65DAA(5)(c) and (d).

118 O'Brien, above n 8, at 11. This proposal was based on Professor Chisholm's recommendations in his *Family Courts Violence Review*, above n 30.

119 Chisholm, above n 30, Recommendation 3.4.

120 See H Rhoades, C Frew and S Swain, 'Recognition of violence in the Australian family law system: A long journey' (2010) 24(3) *AJFL* 296.

121 Chisholm, above n 30, p 129.

122 Chisholm, above n 36, p 3.

123 See on this, K McCoy, E M Cummings and P T Davies, 'Constructive and destructive marital conflict, emotional security and children's pro-social behaviour' (2009) 50(3) *Journal of Child Psychology and Psychiatry, and Allied Disciplines* 270; J McIntosh, 'Enduring Conflict in Parental Separation: Pathways of Impact on Child Development' (2003) 9 *Jnl of Family Studies* 63.

124 FLA s 65DAA(5)(c) and (d).

125 Chisholm, above n 36, p 3.

126 Such as the protection of children's rights: see FLA s 60B (4); M Kirby, 'Family Law and Human Rights' (2003) 17 *AJFL* 6.

127 Including the need to make orders that will, as far as possible, finalise litigation.

128 Chisholm, above n 36, p 12.