Journal of Family Law and Practice

Volume 2, Number 3 • Winter 2011

The Journal of the Centre for
Family Law and Practice
London Metropolitan University

Journal of Family Law and Practice
Volume 2, Number 3 • Winter 2011

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Editor's Message

This final issue of 2011 completes contributions on the more generalised international focus of the Centre's highly successful Summer School held in July 2011. We have a number of interesting articles bringing together academic and practitioner perspectives from other jurisdictions on issues which concern us in England and Wales, and which underline the importance of specialist overseas contributions to our contemporary national debates.

The first, from Professor Trude Haugli of Tromso University in Norway (a very welcome contributor to the Summer School) and Associate Professor Elena Shinkareva is on the Norwegian and Russian approaches to the balance between family support and State intervention for child protection. This is timely in view of the focus of the Final Report of the Family Justice Review on radical improvement of the contribution of Family Justice in ensuring effective local authority services for children in England and Wales: and indeed in view of Professor Peter de Cruz's article in our last issue on the continuing syndrome of glaring (and too often fatal) abuse of children still somehow not addressed by present systems.

Secondly, David Hodson of the International Family Law Group, analyses the EU Council Maintenance Regulation 4/2009 of 18 December 2008 on Jurisdiction, Applicable Law, Recognition of Decisions and Co-operation in Matters relating to Maintenance Obligations. This Regulation continues to generate confusion, despite, or perhaps because of, having had effect in English Law since 18 June 2011. In view of the ongoing problems that he foresees we look forward to Sir Peter Singer's article in our next issue on the new alternative financial dispute resolution tool of Family Arbitration under the rules of the Institute of Family Arbitration, which offers a more private, speedy, (and possibly more cost effective) determination of family financial disputes under a number of statutes than the traditional resort of litigation in court. We shall be including a session on IFLA's Family Arbitration option in our Second International Conference in 2013, in which Sir Peter and David Hodson will both participate.

Thirdly, Dr Monica Navarro of the University of Barcelona contributes a most interesting Case Note on a Spanish Supreme Court ruling on social motherhood in same sex female relationships which will be the subject of a further article by herself and a colleague from that University in a 2012 issue.

Fourthly, Alexandra Tribe of Expatriate Law in Dubai has an interesting insight into problems of service abroad under the new FPR 2010 where (as in the case of clients of her firm in Dubai) the overseas jurisdiction is not a member of the EU.

Finally, another topic much in the news (because of consideration throughout the past year by the Ministry of Justice of whether forced marriage should be criminalised) we have an initial report of their pilot study by Professor Marilyn Freeman and Professor Renate Klein of CWASU (the University's Child and Women Abuse Studies Unit). This follows their collaboration in recent research into university responses to forced marriage and violence against women in the UK.

Their small scale study set out to gather evidence about visibility of and approach to the forced marriage syndrome in further and higher education institutions which typically draw students of vulnerable ages.

Their conclusions (namely that forced marriage is not an issue which is well understood or even recognised in locations where potential victims are likely to be found) support the Centre's response to the Ministry's consultation, in which we drew attention to the cultural sensitivities which suggest that criminalisation is not necessarily the appropriate way forward since that might well drive the practice of forced marriage even further underground.

In the circumstances, since there is already significant provision within the existing criminal law to prosecute offences which are usually automatically committed when an individual is forced into a marriage which is not one of free choice, the Centre's response to the consultation has always preferred the option of prosecuting the inherent existing offences rather than to create a new substantive offence. This is because of the well founded fear, shared by many specialist charities working in the field, that criminalisation of forced marriage as such may cause unintended consequences in the minority ethnic communities retaining family connections overseas in which the practice is most often located, so that potential victims can be routinely lured abroad under the guise of visiting relatives for a family holiday which then turns out to be for the purpose of contracting an unwanted marriage.

An immediate likely result of criminalisation may simply be to make perpetrators more careful than ever in laying their plans for luring potential victims overseas, and, when the unsuspecting family member discovers the true purpose of the visit, concern about criminalising a family member (especially a previously respected senior family member) may discourage the victim from reporting the facts or seeking help.

Articles in our 2012 issues will look ahead to our Second International Conference, 3-5 July 2013, in which we anticipate an international spread of papers and speakers on the linked topics of Parentage, Equality and Gender which span both Child and Family Law.

Frances Burton

Editor, Journal of the Centre for Family Law and Practice

This issue may be cited as (2011) 2 FLP 3, see online www.londonmet.ac.uk/flp

Family support and intervention for the protection of the child in Norway and Russia •

Trude Haugli* and Elena Shinkareva**

Summary

Protection of children is one of the duties of the State Parties to the UN Convention on the Rights of the Child (CRC). The State has the right to interfere into family life if necessary in order to fulfil its obligation to protect the child. However, intervention into family life has its limitations based on the duty for the State to respect the rights and obligations of the parents. The complex matter of balancing support and intervention poses a challenge for each national system of child protection and forms the specific legal models of "intrusion - support" interaction between the family and the State. In this article we explore the main traits of those models as they are expressed in Norwegian and Russian legislation. Our comparative approach provides us with an opportunity to see similarities as well as distinctive characteristics of the two national models. Both are historically rooted and include their own traditions, but both correspond to international law.

1. Introduction

Interference of the State in family life is attracting much attention in western literature, and has been discussed from the point of view of the legal framework and the justification for such state interference.

Norwegian legal academics have developed an increased preoccupation with the questions of children's rights and the balance between the interests of the child and those of the parents. The issue of interference by the State in family life is a significant part of this discussion. Over the last 30 years, several doctoral theses have dealt with this topic. Unfortunately most are written is in Norwegian and, as such, are not easily accessible.

International law plays an important role in the development of national legislation in Norway. Norway has been a member of the Council of Europe since its foundation in 1949. The European Convention on Human Rights (1950) and the UN Convention on the Rights of the Child (1989) form and have formed an important framework for Norwegian domestic legislation.

In Russian legal literature, the problem of justification and limitations of state intervention has hardly been in focus in the same manner as in western legal thinking, and is widely discussed in the context of the role of the State in their interface with families. Post-Soviet legal thinking has explored the principles of democracy and respect for human rights and dignity only for about 20 years. State-family relations have been fundamentally reassessed during this period, and the Decree of President Yeltsin on fundamentals of state family policy issued in 1996 expressed a commitment to human values, international human rights documents and the principle of social welfare and the rule of law.[1] But the balance between state intervention and respect for human rights, and first and foremost the rights of the child, is a challenge for the modern Russian law.

After becoming a member of the Council of Europe, ratifying the ECHR, and accepting the jurisdiction of the European Court of Human Rights in 1998, Russia has been strongly influenced by European Court case law during the past decade. However, it takes time to modernise the legislation. In this article we explore Norwegian and Russian legislation forming the mechanism of interaction between the State and the family at social risk (the vulnerable family) in a comparative manner.

· The study was carried as part of a cooperation agreement and due to the financial support of SpareBank 1 Nord-Norge's donation fund.

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[1] The Decree of the President of the Russian Federation "On basic trends of the state family policy", May 14, 1996. No. 712, http://www.consultant.ru.

Russian and Norwegian legal systems are developing in different cultural and economic contexts and have their own historical traditions. But the elements of the two systems can be compared. The *tertium comparationis* (common denominator) is provided by the common obligations required by the CRC, as well as basic principles of human rights for children, which are accepted by both states.[2]

Both Russia (as the USSR) and Norway signed the CRC in 1990, shortly after its adoption by the General Assembly of United Nations. The USSR ratified it soon thereafter in August 1990, Norway in January 1991.

By the Norwegian Human Rights Act (1999) the EHRC was incorporated into Norwegian law, and the convention was given precedence over any other legislative provision that conflicts. From 2003, the UN Convention on the Rights of the Child (CRC) is also incorporated this way. Hence, the CRC also takes precedence over any other Norwegian legislative provisions.

Both states have accepted the Convention in full, without reservations, and they remain in force.[3] Consequently, by virtue of this acceptance, both Russia and Norway have duties with regard to protection of childhood.

We must therefore assume that both legal systems pursue the same goal in accordance with the Convention – that is to say, one of ensuring the best interests of the child and promoting the stability of family life until and unless it is necessary to take the child away from the family for valid child protection reasons. Balancing of support-interference can be seen as a specific national model of state-family interaction.

2. The concept of state intervention into family life and state-family interaction

The CRC provides each state with two main tools: assistance for parents in so far as they bear primary responsibility for their children, and constraints in the event that they fail to fulfil their parental duties.

Article 3 par. 2 of the CRC states:

> State Parties undertake to ensure the child such protection and care as is necessary for his or her well-being, taking into account the rights and duties of his or her parents, … and, to this end, shall take appropriate legislative and administrative measures.

There are different approaches to the concept of state intervention into family life and, in a wider context, state policy towards the family.

In some legal systems, both social support and safeguarding measures in situations where problems arise in the family if parents fail to provide proper care for the child are regarded as intervention. In other systems, only matters involving the State in extreme cases are defined as intervention. Intervention can be interpreted as a complex of either supportive measures or controlling measures. The differences between the legal systems might be seen through the level of extensiveness of the state intervention (more family autonomy – less intrusion or more children's autonomy and less emphasis on kinship)[4]. Contemporary legal scholars suggest the concept of state-family interaction, based on distinguishing social measures offered on the basis of the parent/child consent or measures taken without such consent.[5]

Lorraine Fox Harding suggests four perspectives of

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[2] The legal system in Norway is dualistic. International law and domestic law form two different parts of the legal order. This implies that international law is not directly applicable by the Norwegian courts. The international conventions must first be implemented, either incorporated or transformed into Norwegian Law, and this requires an Act of Parliament. This principle of dualism is crossed by the presumption principle which states that the Norwegian law must be interpreted as fairly as possible in a way that does not conflict with international customary law or with a convention that Norway has ratified, no matter whether it is transformed or incorporated into domestic law or not.
The legal system in Russia is monoistic. International treaties of the Russian Federation become an integral part of the national legal system after the State ratified it, which fact is confirmed by a federal law. Moreover, the Constitution of the RF stipulates the precedence of the international obligations of the state against national legislation, saying that "If an international agreement of the Russian Federation establishes rules, which differ from those stipulated by law, then the rules of the international agreement shall be applied" (art. 15).

[3] Norway had made reservation in respect to art. 40(2)(b)(v) of the Convention upon the ratification of it, but on September 19,1995, the Government of Norway notified the Secretary-General that it had decided to withdraw its reservation.

[4] See, e.g, Coady, M. "Reflections on children's rights" in Funder, K., (ed) *Citizen Child* AIFS Melbourne 1996; Eichner, Maxine. *The Supportive State.* Oxford University Press, 2010; Guggenheim, Martin. "Child Welfare Policy and Practice in the United States 1950-2000" in Katz, SN, Eekelaar, J, Maclean, M (eds) *Cross Currents. Family Law and Policy in the United States and England,* Oxford University Press, 2000; Houlgate, Laurence D. "What is Legal Intervention in the Family? Family Law and Family Privacy", *Law and Philosophy*, 1998, 17: 141-158; *International Child Law,* Buck, T et al. 2nd ed. Routledge, 2011, pp. 14-20; Millar, Jane & Warman, Andrea (1996) *Family Obligations in Europe: the Family, the State and Social Policy*. Joseph Rowntree Foundation. York.

[5] See, e.g. Williams, J. *Child Law for Social Work*. SAGE, 2008. p. 1.

child care policy, describing special traits of each relations type: (1) laissez-faire and patriarchy, (2) state paternalism and child protection, (3) the modern defence of the birth family, and (4) parents'rights and children's rights and child liberation. Each type of state policy is characterised by greater or less emphasis on the respect for family autonomy and, therefore, non-intrusion, or otherwise the importance of protection of the child, thus justifying intervention.[6]

Balancing between intrusive actions and respect for family autonomy requires clear legal frameworks defining the notion of 'vulnerable family' or 'family at risk', the grounds for intervention and its consequences.

3. Support and intervention into family life: definitions

It is frequently difficult to determine the boundaries between support and intervention into family life. Is support something granted and taken voluntarily if a family or individual is in need of it? Can such measures be compulsory? When support measures are offered after intervention into family life, is it still support?

The term "support" as such seems to have significantly wider context in the state policy of promoting and ensuring basic family needs as a whole. Article 27 (3) of the CRC states:

> State Parties, in accordance with national conditions and within their means, shall take appropriate measures to assist parents and others responsible for the child to implement this right and shall in case of need provide material assistance and support programmes, particularly with regard to nutrition, clothing and housing.

In this meaning, the support will be regarded as a general measure, such as minimum standards of social services, minimum wages that are guaranteed, adequate financial benefits in situations of need, etc.

In child protection policy this term may have a slightly different meaning. For the purpose of protection, this provision can imply the power to oblige parents to provide some supportive measures in the best interests of the child and under state control. Hence, in some situations support may be anything undertaken voluntarily or applied for, but in other situations something that the family is obliged to fulfil in accordance with the law.

Consequently, measures of support can be conventionally divided into two types:

- whether the measures are applied for by the parents, and
- whether the measures are offered to the family on the basis of the parents'/child's consent, and even if initiated by the relevant authorities, they are adopted after such consent.

Situations in which the above conditions are met can be considered as a "supportive interaction", while otherwise measures which have to be accepted by the family can be regarded as "coercive interaction" and, therefore, intervention/intrusion into family life. The latter is especially obvious either in situations of tougher actions on the part of the authorities (such as removing the child from the family) or when the state services are forcibly imposed on the family (e.g. an order requiring the parents to provide special measures for the child).

Jane Williams suggests using the terms "voluntary engagement" and "compulsory measures" to distinguish between measures implemented with the consent of the child and/or persons with parental responsibility and those that are not.[7]

The two distinct means of interaction can be combined and intertwined. Both supportive and coercive measures are aimed at protection of the child and have to be based on the principle of the best interests of the child, which requires flexibility and individual approach.

In our research, we were principally interested in the narrower aspect of support that in many cases becomes mandatory since it involves the state protection system for children.

4. Relevant legal basis

4.1. State Parties obligations according to the UN CRC

The CRC gives an important impetus for the interaction between the State and the parents in the best interests of the child. Article 3 (2) of the Convention says:

> State Parties undertake to ensure the child such protection and care as is necessary for his or her well-being, taking into account the rights and duties of his or her parents, …and, to this end, shall take all appropriate legislative and administrative measures.

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6 Fox Harding, Lorraine. *Perspectives in Child Care Policy*. Pearson Education limited, 2nd edition, 1997.

7 Williams, J, *Child Law for Social Work*, SAGE, 2008, p.1.

Several conclusions follow this provision. At first, both the State and the parents are responsible before the child in ensuring his/her best interests, so they share the duties and obligations in taking care of children and giving them protection. There should be balance between the parents' and the State's responsibilities based on appropriate legislative and administrative measures.

The second conclusion is that the primary duty to ensure protection and care is incumbent on the parents, and in case they fail to perform it the State "…must provide a "safety net", ensuring the child's well-being in all circumstances".[8] It is namely the State that has special instruments and resources that can be affordable and appropriate in every case where the child needs safeguarding.

Additionally, the words "taking into account the rights and duties of his or her parents" correspond to the provisions of Article 5 "… to respect the responsibilities, rights and duties of the parents…". This obligation of the State addresses one of the basic rights of the child – the right to family life (including the right not to be separated from the parents, to have personal relations and direct contact in case of separation, Art. 9 and 10).

The provisions of Article 9 give an important guideline in assessing whether the separation of children and parents was legitimate. Intrusion may be justified if separation is necessary for the best interests of the child, in particular, as the article mentions, in cases of abuse or neglect of the child by the parents (para.1 Art.9). It is important that this is implemented in accordance with the law and subject to judicial review. The national legislation of the State Parties should provide the relevant norms to address this provision.

Obligation of the State Parties to assist the parents in their responsibility for the upbringing and development of the child is stressed in Article 18 (2). In conjunction with Articles 3(2), 5, and 27 this provision emphasises that the State has to step in to ensure the child's rights if the parents as the principle caretakers fail to provide for the child's needs.

> The State should assist families identified as at risk of breaking down with practical measures, such as financial benefits, housing, day care, home helps, equipment and so forth, as well as psychological and professional support.[9]

Last but by no means least, is the obligation of the State Parties to identify cases where a child is in need of protection. Article 19 obliges the State and gives the obvious grounds to intrude into family life in cases of abuse, neglect, and all forms of physical or mental violence towards the child. As para.2 stipulates, protective measures should include appropriate measures, such as social programmes for support for the child on the one hand and, on the other hand, identification, reporting, referral, investigation and other means for judicial involvement.

This combination of two important obligations - to ensure protection and care for the child on the one hand and to respect rights and responsibilities of the parents on the other hand - implies that the State has to strive to a fair balance between supportive and intrusive measures. How far can the State go with regard to the parents' right to bring up their child and the child's right not to be separated from the parents? To what extent the State is entitled to interfere with the private life of the family with children and what limitations for such intervention are acceptable?

There are no certain and direct answers to these questions. Each family and each situation is so specific that fair balance should be established on a case by case basis taking into account all relevant factors. However, some important guidelines for seeking the relevant criteria were suggested by the European Court of Human Rights.

4.2. The European Convention on Human Rights and Fundamental Freedoms (ECHR) and the jurisprudence of the European Court of Human Rights (ECtHR)

The right to respect for private and family life is ensured by Article 8 of the ECHR, which also states when it is acceptable for the State to interfere. While Article 8 does not address any specific rights of the child, the effect of its interpretation follows up and enriches the provisions of the CRC in understanding family-state interaction and balance of supportive and coercive actions of the State.

According to the case law of the ECtHR, the following guidelines are suggested as acceptable:

- the necessity can be justified if there is no other measure available to provide the child with the necessary;
- a separation should in principle be a temporary measure for the shortest time possible;

[8] *Implementation Handbook for the Convention on the Rights of the Child.* – 3rd ed. UNICEF, 2007, p. 40.

[9] *Implementation Handbook for the Convention on the Rights of the Child* – 3rd ed. UNICEF, 2007, p. 237.

- the decision on separation should be subject to regular review;
- the reunification of a child with the parent should not be unnecessarily impeded by the decision on separation; and
- all the above-mentioned do not exclude the possibility of separation to be final in the best interests of the child.[10]

Moreover, the ECtHR stresses the necessity of fair balance between the aim pursued and measures taken in many cases. In particular it notes, "…the decision-making process leading to measures of interference must be fair and such as to afford due respect to the interests safeguarded by Article 8".[11] The Court must take into consideration the involvement of the parents in the decision-making process, "seen as a whole, to a degree sufficient to provide them with the requisite protection of their interests".[12]

The involvement of the parents requires that they are provided with necessary information, while the concept of "sufficient involvement" implies the relevant reasons and evidence on which the decision was made as well.[13]

When speaking about legal aspects of state intervention into family life, there should be clear and foreseeable grounds for such intervention in the interests of the child, expressed in the law.[14]

4.3. National legislation

4.3.1. Norwegian legislation

Legislation regarding children in vulnerable circumstances has a long tradition in Norway.[15] The first act, adopted as early as in 1896, was called "Vergerådsloven" (The Guardianship Council Act). The intention of this Act was complex. Children with behavioural problems were to be considered as deprived children, not as criminals. Helping the children was in the common interests of society and the clients. The intention was further to humanise the system of criminal justice. Placement in correctional institutions was meant to be of benefit to the children and act as a crime prevention measure. Any decisions were to be made according to criminal procedure system, fulfilling the requirements of due process. Two professions were especially engaged in these problems; the criminologists who wanted to get the children out of prisons and the educationists who wanted to segregate children with behavioural problems from ordinary school. Approved schools became the answer.

The intentions were good. However, in reality the institutions did not work in accordance with the intentions. The system became a system to protect society, while the approved schools lacked resources and served more as punishment than as educational institutions.

In 1953, a new Child Welfare Act was adopted. There had been important changes in the way society looked upon children living in unsatisfactory circumstances. Focus had shifted from protection of society towards help, treatment and protection of children. Ideologies based on belief in treatment served as the foundation for the legislation and psychology as discipline played an important part. Given the good intentions of the Act and emphasis on the best interests of the child, help and support, the importance of legal guarantees was de-emphasised.

Over the following years the Municipal Child Welfare Service was subjected to criticism because of *inter alia* deficiencies in the requirement of due process, the help came too late and the threshold for help was too high. This eventually led to new legislation, the Act of 17 July 1992 no. 100 relating to Child Welfare Services (the Child Welfare Act).

An important change consisted of the introduction of different thresholds for implementation of support measures in the family and for decisions about care. It was made possible to implement support for the family at an earlier stage. A distinction between the decision-making systems for means of support and for compulsory measures was introduced.

The Child Welfare Act consists of 10 chapters, and offers principal provisions of the protection, aim, duties and rights of the state bodies and division of

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[10] These criteria were summarized in: Jaap E. Doek. "Article 8: The Right to Preservation of Identity, and Article 9: The Right Not to Be Separated from His or Her Parents", in : Alen, A, Vande Lanotte, J, Verhellen, E, Ang, F, . Berghmans, E, and. Verheyde, M, (Eds.) *A Commentary on the United Nations Convention on the Rights of the Child* (Martinus Nijhoff Publishers, Leiden, 2006). Pp. 25-26. See also Kilkelly, U. "The right to respect for private and family life" , *Human rights handbooks, No. 1*, Council of Europe, 2001, pp. 51-54; Roagna, I. *Protecting the right to respect for private and family life under the European Convention on Human Rights*. Council of Europe, 2012, p. 49, 70-72; Van Bueren, G, *The International Law on the Rights of the Child.* Martinus Nijhoff Publishers, 1995, pp. 82-86.

[11] *McMichael v United Kingdom*, appl. 16424/90, Judgment of February 24,1995, par. 87,

[12] *Ibid*.

[13] See, *Children Law*, Charles Prest, Stephen Wildblood QC, Jordan Publishing Limited, Bodmin, 2005, p. 70.

[14] As the focus is national law and owing to limitations this article does not cover analysis of the ECtHR case law.

[15] Tove Stang Dahl, Barnevern og samfunnsvern, Oslo 1992.

responsibility between different levels of administration. It also includes general rules on investigation of the case and on 'care orders' – the main instrument of coercion in the interests of the child in the severe cases – as well as regulates the legal status of different types of childcare institutions and provisions relating to the sharing of financial responsibilities.

4.3.2 Russian legislation

Modern Russian legislation on protection of the child at risk consists of the main act, Fundamentals of Prevention of the Minor's Neglect and Delinquency Act (PNDA), adopted on June 24, 1999; and some provisions of the Family Code, adopted December 29, 1995, such as chapter 11 (the Rights of the Child), art. 77 (Taking the Child Away if There Is a Direct Threat to His/her Life or Health), and chapter 18 (Identification and Accommodation of Children Left Without Parental Care).[16] Besides, a special law is devoted to welfare guarantees for children left without parental care and orphan children with a complex of provisional measures (Act of 1996).

The Family Code provisions on children's rights were the earliest general norms adopted in Russia after the ratification of the CRC in September 1990 by the Soviet Union. As officially declared legal successor of the former USSR's responsibilities according to international treaties, Russia is a Party of the Convention, and the CRC is a part of the legal system of the Russian Federation. There were no children's rights mentioned as such in the earlier legislation though the legislation concerning protection of the child has its history in Soviet law. The modern regulations expand the notion of 'children left without parental care' and the range of forms of family placement if compared with the law of the USSR.

The PNDA was adopted later as an Act that was necessary in the circumstances of a high level of child neglect,[17] and also as a response to the recommendations of the Committee on the Rights of the Child on Russia's initial periodic report, in particular its concern about the increasing crime rate among children (para.15) and the necessity to pay more attention to family aspects (para.18).[18] Similar laws were adopted on the regional level, meaning the protection and social welfare of the family and children is in the shared competence of the federal and regional levels of power.

5. The family/child at social risk (vulnerable family): definitions and interpretation

The terms 'family/child at social risk' and 'vulnerable family/particularly vulnerable children' are generally widely-used concepts in the field of social research. The notions have different legal definitions for the purposes of state support and intervention to family life. National legislation may offer different definitions addressing this notion for special purposes.

The legal definitions offer some essential characteristics that justify the interference into family life independently of the parents' behaviour (if they are guilty or not in the 'risk situation'), and also gives the grounds for further measures of the authorities. From that point of view, we could see the specialties of the legal system and make a conclusion about traditions and culture, as well as the main challenges for state policy.

In the Norwegian Child Welfare Act, this concept is expressed as "children and young persons living in conditions that may be detrimental to their health and development". The law formulates the main purpose of the Act as to ensure that children and young persons grow up in a secure environment and will receive in the above-mentioned situation necessary assistance and care at the right time (section1-1), so the accent is precisely on the situation of a child in the family. Hence, a child can be regarded as being at risk if he/she has no secure environment in his/her family; his/her health or development are at risk, and/or he/she needs assistance and maybe care. This definition may be regarded as a general one for different cases.

Russian legislation, unlike the Norwegian equivalent, has several definitions that may be cited as 'being at risk' expressed in different Acts. It initially offers the general

[16] Russia is a federation; hence there are two levels of legislation and government – federal and regional. According to the Constitution the social welfare and protection is a matter of the shared competence. The fundamental regulation is provided on the federal level. And the regions (subjects of the federation) possess the competence within and in compliance with the federal framework, and in addition can use their own resources outside federal regulations.

[17] According to the Ministry of Labour and Social Development statistics, the increase in numbers of children whose parents were denied parental rights doubled between the years 1995 and 2000. See, for example, *Child's neglect and homelessness: challenges and ways of solving problems*, Analytical Herald of the Council of Federation of the RF [Analiticheskyi Vestnik Soveta Federatsii FS RF]. 2002. No. 20(176), p. 70. http://www.budgetrf.ru/Publications/Magazines/VestnikSF/2002/vestniksf176-20/vestniksf176-20080.htm (05.03.2011)

[18] See, Concluding Observations of the Committee on the Rights of the Child: Russian Federation, CRC/C/15/Add.4, 18 February 1993, www.un.org.

definition of 'the child in a difficult living situation' as a basic fundamental for state support and a matter of special attention for the authorities. The Basic Guarantees of the Rights of the Child Act [19] defines this term in a way of enumerating several certain situations considered as difficult.[20] This general definition may be considered as a guideline for the federal and regional authorities, as well as municipalities, to draw attention to special groups or situations where children are particularly vulnerable and need assistance and protection. However, the other Acts are used for the individual casework.

The PNDA[21] offers the term 'Family at insecure/ endangering social situation', which has the following definition: a family with children in an insecure situation, and a family where parents/their substitutes do not fulfil their duty for nurturing, education and/or allowance of the child or affect negatively on their children or abuse them. The child is regarded as in an 'insecure social situation' if he/she "is neglected or homeless and therefore is in [a] dangerous situation for his/her life and health or commits an offense or other acts against social order". Both definitions provide grounds for state support ('individual preventive work'), and intervention in family life (such as, for example, decisions on placement of the child into institutional care), which can be in the form of a voluntary engagement or as compulsory measures (after issuing a decree or judgment).

Above all, the Family Code provides the term 'children left without parental care' and includes in this concept different situations when a child is without parental care, such as: children in the case of the death of their parents, whose parents are denied or restricted in their parental rights, whose parents are recognised as legally incapable due to a mental disorder, if they are sick, absent for a long time, or avoid bringing up their children or protecting their rights and interests (art. 121). In 2008, this list was amended with the words "if the parental behaviour causes threat for the health and life of the child or impedes normal nurturing and development of the children". The list of such situations is not exhaustive. Hence, the concept of 'children left without parental care' can be expanded.

The two definitions mentioned above overlap and to some extent compete, which may cause practical complications in work with individual cases.[22] Besides, there is the concept 'family at social risk' that is used for practical purposes of preventive individual work, supervision and support by the public agencies. This term (meaning the wide range of family circumstances such as alcohol or drug addiction, employment and high dependency status, weak parental experience, and other situations of family disintegration or risk of a break) is widely used by specialists, but has no clear definition in law.

For separation of the child and his/her family (removal of the child), both Norwegian and Russian laws provide special definitions expressing the higher level of 'being at risk'. See para. 8 'The grounds for interference' in this article.

6. The best interests of the child principle

In all forms of the state-family interaction, the best interests of the child is a primary consideration. This is a basic principle, as is stated in Article 3 of the CRC.

Though the CRC is incorporated in Norwegian law, the Child Welfare Act stresses this principle as one of decisive importance in framing measures for the child, in order to prevent neglect and behavioural problems, and specifies it. As it is stated in section4-1:

> When applying the provisions of this chapter, decisive importance shall be attached to framing measures which are in the child's best interests. This includes attaching importance to giving the child stable and good contact with adults and continuity in the care provided.

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[19] Federal Law "On Basic Guarantees of the Rights of the Child in the Russian Federation", dated July, 24, 1998 No. 124-FZ with the amendments, Art. 1.

[20] It mentions children without parental care; children with disabilities; children who are victims of armed and ethnic conflicts, ecological, and technological or natural disasters; children from refugee/displaced persons' families; children in extreme situations; children who are victims of violence; children imprisoned in penal colonies for young offenders; children in special care institutions; children in families with low income; children with behavioural problems; and children whose living activities were objectively detrimental by circumstances which may not be overcome on their own or with the help of the family.

[21] Federal Law "On Fundamentals of the System of Prevention of Minors' Neglect and Delinquency", dated June, 24, 1999 No. 124-FZ with the amendments, the last of which dated February, 7, 2011. Art. 1.

[22] In particular, the complications follow from the competing competence of the state bodies responsible for the law enforcement. The central coordinating authority according to PNDA is the system of Commissions for prevention of child's neglect and delinquency. In accordance with the Family Code the Guardianship authorities are responsible for protection of children without parental care.

Russian legislation, in contrast to Norwegian, does not mention this principle in special Acts, such as the PNDA. The PNDA just refers to the CRC as the source of the minor's rights, which are to be ensured, and some of those rights are enumerated (art. 8). State bodies and institutions which are included in the system of prevention of child neglect and delinquency are to ensure the rights and legitimate interests of the child (art. 9). But the primary consideration of the best interests of the child is omitted.

7. An obligation to support

The duty to support in general (as mentioned above) is one of the State's social functions represented through the various types of social welfare services and financial support measures that are available in accordance with the law. Both states have such social welfare systems for families. However, we are interested here in the special measures that are provided in situations of social risk for the child, as described above, and on the grounds stipulated by special legislation on protection of the child.

In Norwegian legislation, the duty to provide advice, guidance and assistance, including parental, child and family measures as a whole is one of the main duties for the Child Welfare Service. This duty is based on the general principles of the less intrusive measures, priority to family life (the principle of biology) and, of course, the best interests of the child.

As Section 4-4 para. 2 of the Child Welfare Act stipulates:

> The Child Welfare Service shall, when the child, due to conditions at home or for other reasons, is in particular need of assistance, initiate measures to assist the child and the family, e.g. by appointing a personal support contact, by ensuring that the child is given a place at a kindergarten, or by providing a respite home or respite measures at home or a stay in a centre for parents and children or other parental support measures. The Child Welfare Service shall similarly seek to initiate measures designed to encourage the child to take part in leisure activities, or contribute to ensuring that the child is offered training or employment, or an opportunity to live away from home. Furthermore, the Child Welfare Service may place the home under supervision by appointing a supervisor for the child.

The measures to be provided are meant for the situations when a child 'due to conditions at home or for other reasons is in particular need of assistance' in terms of section 4-4. The list of assistive measures is not exhaustive. In special cases like disability, child refugees, or behavioural problems of the child or in other particular need of long-term, coordinated and comprehensive measures, the Child Welfare Service is to prepare an individual plan for assistance to the child.

One important duty of the Child Welfare Service related to providing assistance is the duty to collaborate with other parts of the public administration and voluntary organisations, and in particular on framing measures in the individual plan.

In most cases assistive measures are provided on the basis of the parent's consent, including the arranging of a place for the child in a foster home, institution or care centre for minors. In some cases the measures of support can become obligatory for the parents after a decision made by the County Social Welfare Board. Section 4-4 para. 4 stipulates, in particular:

> The County Social Welfare Board may if necessary decide that measures such as a place at a kindergarten or other suitable day care facilities shall be implemented by issuing the parents with an order to this effect.

The same section gives the right to the County Social Welfare Board to issue a supervision order in cases of serious deficiencies of the everyday care of the child at home, and on the other grounds stipulated in Section 4-12 and this may be the reason for the removal of the child as well.

Individual measures of assistance shall be provided as long as it is necessary to assist and may be applied in respect of children and young people under 18 years of age. With the consent of the young person, measures implemented before the age of 18 may be maintained or replaced with other measures until the person has reached the age of 23.

In Russian legislation, contrary to the Norwegian legislation, concrete measures of assistance are not stipulated. The duty to provide assistance measures ('social rehabilitation of children and parents') lies with the social services institutions (centres of family and children social support, centres of psycho-pedagogical assistance, centres of emergent psychological help, and

others) and with secondary and professional educational institutions, as stipulated in Articles 12-14 of the PNDA. The definite types of services are offered in accordance with the executive regulations and statutes of the institutions.

In the third state periodic report to the Committee on the Rights of the Child, Russian authorities mentioned an amount of institutional services for family and children.[23] The counselling assistance is mostly provided out of the home, in special institutions where the parents can consult specialists, receive training, etc.

The measures noted in the PNDA are to be defined in the individual programme of social rehabilitation. The general list of services including temporary housing, pre-medical help, assistance with access to medical treatment, psychological and legal consultations, support in access to education and choice of profession, assistance with access to social welfare and social benefits is enumerated in the National Standard of Social Services to Family.[24] The measures offered by each institution are defined by the institution's regulations in accordance with the central (governmental) recommendations. The major social services for family are provided by the institutions of the system of health and social care on the regional level. Some services for family and children are offered by municipal institutions as well, for example centres for support of families at social risk. Non-governmental services are not excluded, but still do not take a significant place in the system for the protection of the child.

The duration of the assistance ('individual preventive work' in the terms of the PNDA) depends on the necessity for it, and can be provided until the neglect involved ends. Maximal duration is limited by the age of majority of the child (18 years old) according to federal law.

As we can see, in Norway and Russia different approaches are used in organisation of support measures. In Norwegian legislation, the supportive measures are specified in the law, and offered on the basis of the parents' consent as a general rule. Coercive measures can be implemented in cases otherwise detrimental for the child, but only if other measures are not deemed to be adequate due to the situation. Furthermore, certain measures may be provided without removal of the child from its home.

In Russian legislation, measures of assistance are not specifically set out in statute. The range of support measures is delivered through practical application of the programme, accessed in accordance with the resources of the state social service institutions. The services are offered mostly at institutions, not at home.

8. Removal of the child from the family

The rule of Article 9, para.1 of the CRC stipulates that a child shall not be separated from his or her parents against their will, except if such separation is necessary in the best interests of the child. This necessity (and so, the limits of the discretion power) is defined in the national law.

8.1. Norwegian legislation

8.1.1 The grounds for separation

In the Norwegian Child Welfare Act, separation of parents and children may in some situations be made with parental consent and in others without such consent. Basic requirements and guidelines for both can be found in the law.

The law gives the main guidelines for the authorities in circumstances which require protection and support of the child, and such guidelines have definite consequence, according to the law:

- if a child is in need of assistance due to his/her current situation at home, the authorities shall provide assistance measures for the child and the family at home (section 4-4 para.1), and if such measures cannot meet the child needs (for different reasons);
- a place for the child in foster home or an institution can be arranged by the public authorities on the basis of the parents' consent (section4-4 para.5); and
- if the risk is relatively high for the child, the public authorities have the right to replace child from the family to foster or institutional care on the basis of a "care order" and without parental consent.

The logic of the Act requires first offering supportive

[23] In particular it was said about 3080 establishments of various types providing services to families and children were in operation, including 41 psychological and educational advice bureaus. Advice on bringing up a child can be given to the family or one of the parents at each establishment providing social services to families and children. CRC/C/125/Add.5, 15 November 2004. par. 123.

[24] National Standard of Social Services for the Population. Social services for family. GOST P 52885-2007. Standartinform, 2008.

measures. It guides the the authorities to act with the least detrimental influence for the child, meaning that rearing a child in the family without doubt addresses the best interests of the child. The most intrusive measures, such as removal from the family, placing in institution care, and thus separation from the parents, can only be used for serious reasons, after considering the situation and the justified conclusion that other measures will be inadequate.

The reasons for removing child from the family are stipulated in Section 4-12 par.1 of the Child Welfare Act as follows:

> A care order may be made
> a) if there are serious deficiencies in the everyday care received by the child, or serious deficiencies in terms of the personal contact and security needed by a child of his or her age and development,
> b) if the parents fail to ensure that a child who is ill, disabled or in special need of assistance receives the treatment and training required,
> c) if the child is mistreated or subjected to other serious abuses at home, or
> d) if it is highly probable that the child's health or development may be seriously harmed because the parents are unable to take adequate responsibility for the child.

The article stresses that an order may be made only when it is necessary due to the current situation of the child. Otherwise, if satisfactory conditions can be created with the other assistance measures, the order may not be made (sec. 4-12, par.2).

8.1.2. The decision on separation

A care order is made by the County Social Welfare Board, the collegial state body that is independent of the Child Welfare Service. The latter is responsible for provision of assistant measures, for preparing cases before this board, and for the implementation of the orders.

The care order shall be implemented as soon as possible, normally not later than six weeks from the date it was issued (sec. 4-13).

The order may be subjected to a review of the district court (sec.7-24).

8.1.3 Consequences of intervention

Removal the child from the family is generally regarded by the law as a temporary measure, which can be replaced with assistive measures when necessary.

The Child Welfare Service is by law required to follow up care orders (sec 4-16) by closely following the development of the children and their parents. The parents are to be offered guidance and help to get in contact with other assistance agencies.

At the same time as a care order is issued, the County Social Welfare Board is to determine whether there shall be further contact between the child and his/her parents and the extent of access (section 4-19). The main rule is that such contact shall be maintained, unless this is contrary to the best interests of the child. The rule is based on the principle of respect for family life and the idea that contact with the family is important for the child, even if he or she cannot live with the parents. Contact is also regarded as important for any future possibility to reunite the child and the parents.

This must be understood in connection with the rule which states that a care order is revocable. The County Social Welfare Board must revoke a care order when it is highly probable that the parents will be able to provide the child with proper care. The order must nonetheless be revoked if the child has become so attached to persons or environment where he or she is living that removing the child will cause serious problems for him or her (section 4-21).

In the most serious cases, the parents may be deprived of all parental responsibilities and the child may be adopted without the consent of the parents.

8.2. Russian legislation

8.2.1. The grounds for separation

In Russian legislation, the grounds for separation and removal the child from the family are stipulated in the Article 77 of the Family Code:

> 1. If a direct threat exists to the child's life or health, the Guardianship and Trusteeship Body shall have the right to immediately take the child away from his parents (from one of them) or from other persons, in whose charge he/she is.
>
> The immediate taking away of the child shall be effectuated by the Guardianship and Trusteeship Body on the ground of the corresponding act of the executive power body of a constituent entity of the Russian Federation.
>
> 2. When taking the child away, the

> Guardianship and Trusteeship Body shall be obliged to inform without delay the Prosecutor, to provide for the child's temporary accommodation and, within seven days after the executive power body of a constituent entity of the Russian Federation passes a decision on taking the child away, to file a claim with the court for depriving the parents of the parenthood or for restricting their parental rights.

As we can see, the removal right of the State appears only in very serious and explicitly dangerous situations for the child, which is obviously connected mostly with physical harm. The state body must, therefore, determine whether the threat is direct beyond any doubt, rather than merely possible, and whether the child, if not removed from the family, will be subjected to serious physical abuse. The discretion of the state body is absolute.

The law does not offer a clearer definition of 'direct threat to the health or life of the child', so the extent of danger should be assessed by the specialist of the GTB according to general moral criteria and the specialist's experience of criminal justice.[25] For this reason, perhaps, this might be one of the reasons that this norm does not show much effect in practice and is rarely applied; serious intrusion in family life is frequently the subject of judicial review.[26] Moreover, the removal of the child from the family is not the duty, but the right of the State. The first sentence of para.1 of the Article fundamentally decreases the significance of such state intervention, in spite of existing duties of the state bodies to protect the child, stipulated in other articles of the Family Code and other laws.

8.2.2. The decision on separation

In order to act speedily in urgent cases, the law is limited to an administrative procedure, without a court decision. The right to act belongs to the GTB with the order signed by the state executive official. The law does not include special rules on the procedure of issuing the order. The decision-making need not be collegial; in this respect the law does not protect the family from arbitrary decisions. The mechanism of review is only slightly touched by the law. The GTB, with reference to Article 77 para.2, must notify the local prosecutor, which has the right to protest against this decision, in accordance with the Prosecutor's Office Act. The parents can also use the general judicial procedure that can be applied against any state body acting illegally.

8.2.3. Consequences of intervention

The law does not offer any further provisions on the duration of separation and periodic review of the situation in the family or any further regulations about communication with the parents. The removal by the State seems to be the last resort in child protection. The family collapse is seen as irrevocable in such cases (though the parents have the right to appeal against the decision).

In a very short period (within one week) the GTB must file proceedings for dismissal of parental rights before the local court. The judgment on the dismissal of parental rights may be repealed through the procedure of judicial review. The parents also have the right to apply to the court in order to restore their parental rights later without time limits (only absence of the child's direct consent can hinder the restoration of parental rights). But it seems pointless to try to establish relations with the child when contact after the dismissal is forbidden by law. Moreover after six months of enforcement of the judgment the child may be adopted without prior parental consent.

In respect to the period after parental dismissal, the modern legislation does not strive to restore family ties at all, and even goes far back to a paternalistic approach. To follow this conclusion one can compare the formulation of Article 71 of the Family Code ('Consequences of the Deprivation of the Parenthood') with the wording of Article 60 with the same title in conjunction with Article 61 ('Meetings with Children of Parents, Deprived of their Rights') of the Code of Wedlock and Family of the RSFSR, 1969. The latter mentions the right of parents deprived of their rights to

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[25] In reports specialists mention the difficulties in forming an evidence base, and note that they mostly use this right in cases when parents abuse alcohol or drugs, if there is no food at home, if the child has no proper clothes for the season, and if the child is physically depleted, see e.g. the report on children's status in StPetersburg, 2009, http://www.homekid.ru/kidinspb2009/, par. 11. (05.03.2011)

[26] The effect of the norm may be seen in one of the cases, which shocked society and was widely discussed. In March, 2009, a three-year-old child was admitted to one of Moscow's hospitals with serious physical injuries. There were grounds to suspect that the harm was brought about by his foster parents. Several days later the foster father took the child away from the hospital. The GTB was strongly criticised for the delay with protection measures, especially that it had not taken the other child they reared away from this family. http://m.if.by/news/world/53276 (05.03.2011)

apply to the guardianship body for permission to have a meeting with the child. Modern legislation does not have such provision in favour of parents whose rights were terminated.

9. Conclusions

Both Russian and Norwegian legislative acts address the basic provisions of the CRC in one way or another, but in some aspects we can see great differences in the approaches.

Legal traditions with a long history of democracy and human rights approach in Norwegian legislation reflect the accent on procedure in making decisions effecting family separation, close-to-home assistance, principles of the paramountcy of the best interests of the child, and less intrusive measures.

Russian legislation on protection of the child has just recently accepted the human rights approach. Therefore, much still needs to be done to address the principles mentioned above.

Though there are common problems for Norway and Russia, such as interagency cooperation and problems of equality of the status of the children living in different regions, the legislation differs in many aspects.

The Norwegian system of child protection is more concentrated since the Child Welfare Service is focused on major individual work with families and concentrates its main resources on that. Moreover, the Service is obliged to cooperate with the other institutions which thus should help to form 'a safety net' for the child.

On the other hand, the Russian system of child protection appears more fragmented, and is spread between several statutes. The several authorities of the child protection system each possess their own competences, overlapping to a certain extent.

The approaches of the two legal systems towards separation of the child from its parents are quite opposite. According to Norwegian law separation must be either a supportive measure (based on consent) or a coercive measure (the decision of the Board without consent). In the latter case separation is not supposed to be the final rupture of family life, so that the parents and the child (except for special circumstances) both retain the right to contact. Regulation is thus more flexible, widening the margin of appreciation for the authorities in the framework of the 'best interests' and other principles. Russian legislation *per contra* is an example of 'harsh' law with the more strict limitation of the margin of appreciation and less sensitive to the circumstances of the individual case. Moreover Russian law seems to suppose the separation as a final rupture (the last resort), with the very limited possibility (if not complete absence in practice) of family reunification. At the same time the measures prior to separation have no clear framework. This allows great latitude for different supportive practices.

The EU Maintenance Regulation: Maintenance / Needs Claims and the Sole Domicile Jurisdiction

David Hodson*

Introduction

The EU Maintenance Regulation[1] (MR) is one of the most complex and bewildering pieces of legislation in English family law, having been directly imposed into English law from the EU with effect from 18 June 2011. Its highly laudable intention is to make maintenance orders automatically recognised and enforceable across Europe. This is not just the preserve of the super wealthy. This is, say, entirely relevant to a mother in Hamburg with several young children and arrears of maintenance of €6000 which she wants to pursue against the father who has moved to Bordeaux. The EU is quite rightly seeking to make it easier for such people to pursue such claims across EU borders without having to invoke complex national processes in each country.

The problems with the EU Maintenance Regulation are very many. It is easier to address in the UK and Denmark, in contrast to all other EU countries where there is an added stratum of complexity based on the 2007 Hague Protocol[2] for countries using applicable law. Even continental European specialist family lawyers working daily with applicable law are reporting real difficulties in its interpretation and implementation.

It gives priority of jurisdiction to marital agreements in which the couple have chosen an EU jurisdiction to deal with maintenance, Art 4. Yet this is very much the civil law, continental European, expectation of marital agreements. There is no necessity of independent legal advice, disclosure or other elements to make sure the parties fully understand the implications. The connection may be very minimal with the country chosen in a marital agreement at the time of the marriage, perhaps a decade previously, yet it takes prior jurisdiction at the time of the subsequent divorce.

The EU Maintenance Regulation relates to maintenance. However there is no definition within the legislation. Specifically practice varies dramatically around Europe.

"Maintenance" is interpreted in this context as "needs"[3]. In English law, needs is one of the criteria for a fair financial outcome alongside sharing, compensation and marital agreements. Fundamentally English case law from the Court of Appeal and High Court has said, in a series of cases, that the court will transfer non-marital acquired assets (such as premarital, inherited or gifted assets) from one spouse to the other if it is required for the purposes of needs. These needs will often be accommodation with children but could include capitalised maintenance. As far as the matrimonial assets are concerned, i.e. those acquired during the marriage, these will have an automatic starting point of equal division. Nevertheless, again the English court will divide unequally if required for provision of needs. Needs trumps equal sharing of assets within the marital acquest.

It cannot be underestimated how important "needs" is within English family law financial outcomes. It is dramatically greater than in most other jurisdictions, certainly within Europe, where needs provision can be very modest. Whereas other countries in north-west Europe may make modest redistributions of wealth for maintenance needs, England will have no difficulty in making dramatic redistributions. Hence this EU Maintenance Regulation has a fundamental impact in England because so many financial outcomes on divorce are determined by reference to maintenance needs.

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1 EU Council Regulation 4/2009 of 18 December, 2008 on Jurisdiction, Applicable Law, Recognition of Decisions and Co-operation in Matters relating to Maintenance Obligations.

2 Hague Protocol on the law applicable to Maintenance Obligations of 23rd of November 2007.

3 See for example *Van de Boogaard v Laumen* (1997) 2 FLR 399 and Moore (2007) 2 FLR 339.

Jurisdiction in the EU Maintenance Regulation

One distinctive element within the EU Maintenance Regulation concerning jurisdiction is now being interpreted by some lawyer practitioners as possibly having a much wider implication than just in cross border EU cases. For many months since June 2011, as lawyers have got to grips with the new law, this aspect has been discussed and debated amongst those lawyers undertaking a significant amount of international work. It needs now to be more widely discussed with views from practitioners, academics, policy makers and others involved in family law issues.

Has the EU Maintenance Regulation created an unintended consequence affecting all non-EU divorce finance work, including impact on domestic jurisdiction in non-EU countries? Or, instead, was it intended? What may it mean in practice? How can its impact be overcome if it is a problem in practice?

The EU Maintenance Regulation asserts that EU member states only have jurisdiction in matters relating to maintenance obligations when either party is habitually resident in that country (Art 3 (a) and (b)) or in the EU country which, "according to its own law, has jurisdiction to entertain proceedings concerning the status of a person if the matter relating to maintenance is ancillary to those proceedings, unless that jurisdiction is based solely on nationality of one of the parties"[4]. Art 3 (d) is in similar terms in the context of maintenance ancillary to parental responsibility proceedings i.e. regarding children.

In English law, the primary proceedings relating to the status of a person are divorce proceedings. Financial claims on divorce are made ancillary to divorce proceedings. Indeed, until April 2011[5], financial claims on divorce were known as "ancillary relief" being ancillary to the divorce suit. So there is no doubt that this Art 3 (c) is referring explicitly within England to financial claims on divorce. These claims are primarily for sharing or needs. In England unlike many civil law jurisdictions, all claims are dealt with together at the same time according to the same law before the same forum by the same lawyers. There is no separation between maintenance and property sharing, between advocates and notaries, nor any concepts of marital property regimes.

Therefore Art 3 states jurisdiction in member states does not lie for financial claims ancillary to divorce if that divorce jurisdiction is based solely on the nationality of one of the parties. It is therefore necessary to look at the divorce jurisdiction across the EU, found in other EU wide family law legislation

EU divorce jurisdiction

This is found in the Brussels Regulation[6], sometimes known as Brussels II (BII). Art 3.1 of BII sets out the common jurisdiction across the EU for divorce, legal separation or marriage annulment. There are six bases for jurisdiction, based on varieties of habitual residence with a seventh of joint nationality or joint domicile. The habitual residence jurisdictional bases overlap considerably, with continuing confusions, even though the legislation has been in force since March 2001.

If no EU member state has jurisdiction for divorce based on these seven jurisdictional bases, then BII[7] allows a further jurisdictional basis, known as the residual jurisdiction. For the UK and Republic of Ireland, this is sole domicile. As stated, it is only available if no EU member state has BII Art 3.1 jurisdiction. It is therefore not available if either party is habitually resident in any EU member state. These are issues which concern specialist family law practitioners dealing with international families across Europe on a daily basis.

The uncertain position about jurisdiction with the EU Maintenance Regulation arises only when this so-called residual jurisdiction basis of sole domicile is relied on.

Implications

If it is now the case, as is being argued by some lawyers, that an English divorce petition based only on sole domicile means the family court has no power or ability to make maintenance needs orders, then what are the implications? What are the possible solutions?

It should be said immediately that this issue has relatively limited application. The vast majority of divorce petitions in England and Wales are on the jurisdiction of joint habitual residence. Indeed this is the default position in the printed form attached to the court rules, FPR 2010. In some other cases, the jurisdiction is the English habitual residence of one of the parties even if the other spouse is

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4 Art 3(c).

5 Changes in Family Procedure Rules 2010 (FPR 2010).

6 Council Regulation 2201/2003 of 27 November, 2003 concerning Jurisdiction and the Recognition and Enforcement of Judgements in Matrimonial Matters and Matters of Parental Responsibility.

7 Art 7.

abroad. If habitual residence of any sort is available, it has to be used instead of sole domicile.

Nevertheless sole domicile is still vitally relied on in a number of cases including where there are connections with countries outside the EU. Anecdotally, the number of contested domicile cases in the family courts has risen significantly over the past few years.

In the demographics, and pattern of international families across the world at the present time, there are many instances of reliance on this jurisdictional basis. It is, for example, the spouse from England living abroad with her husband outside the EU then returning home on the breakdown of the marriage and, as the plane crosses the White Cliffs of Dover, her domicile of origin reverts and the spouse hotfoots from Heathrow to her local divorce court to issue on the basis of her sole domicile. She has not yet acquired habitual residence nor does s/he have the period of simple residence needed for the other bases of jurisdiction. It is in these circumstances where jurisdiction of the divorce is based on sole domicile that there is a belief among some lawyers that the EU Maintenance Regulation does not allow maintenance claims on a needs basis. Accordingly in this example, the wife would not then be able to claim any needs-based settlement provision.

Certainly the family courts would have power to deal with sharing, which might be greater than needs.

Objections

One response is that this EU Maintenance Regulation law is only intended for the EU market. It concerns, or should jurisprudentially concern, only cases involving more than one EU jurisdiction. It regulates the jurisdiction basis, including priority of jurisdiction within the EU. It does not or should not affect non-EU cases in any way to restrict the powers of the English court to make a fair order on a case with which it is competently seized. It is wrong that this jurisdiction provision should prevail in a case of an international family with connections with countries outside the EU

There is absolutely no reciprocity outside the EU. So by way of example in an Anglo Australian case (where there are many international families) if England has jurisdiction on the basis of sole domicile and Australia has jurisdiction on the basis of nationality, there is nothing to prevent Australia dealing with maintenance needs issues, whereas the EU is emasculating the English courts from doing so. It is a different matter if there is a level playing field as there is across the EU where the Maintenance Regulation prevails. There is no level playing field between England and non-EU countries which are simply free to ignore these maintenance restrictions. This cannot be justified on any basis. It works distinct unfairness.

In any event, whilst habitual residence as a basis of jurisdiction finds favour in children cases, and in a number of countries around the world, there are many countries which rely on nationality, domicile, citizenship, various forms of substantial connection and similar. They do not rely on habitual residence. The consequence of the EU legislation on this particular interpretation is that there could be international families with connections with several jurisdictions, but those jurisdictions do not have habitual residence as their basis of jurisdiction for maintenance claims. So an applicant for maintenance with a sole domicile divorce petition in England could find herself prevented from bringing those maintenance claims in England on this interpretation of Art 3 (c) and yet there would be no other jurisdiction in the world where those claims could be made.

Another difficulty is that the concept of habitual residence is very uncertain for international families needing to use cross-border EU family law legislation. Whereas domicile has a status in tax and other areas of personal laws with some degree of precision and certainty and whereas nationality is capable of objective proof, habitual residence has been the subject of differences in case law between national and international courts. It has different meanings in matters of divorce and maintenance than it does in matters concerning children. It has different meanings within the EU and without the EU. It also has a high degree of artificiality for families who simply travel in connection with their work, moved by employers, governments and others from one country to another throughout their working life putting down relatively shallow roots until the next move. Yet the EU in dealing with these very typical international families has put its confidence in a concept and jurisdictional basis which is almost non-existent and meaningless for these families. The EU should be doing better for international families

A solution and remedy?

One solution may be found in Art 7 MR which states that where no court of a member state has jurisdiction under Arts 3, 4, 5 and 6 (the jurisdictional bases of the MR), the courts of a member state may on an exceptional basis hear the case if proceedings cannot reasonably be brought or conducted or would be impossible in a third

state with which a dispute is closely connected. There must be a sufficient connection with the member state. This is technically "forum necessitates". It would seem that this would enable the English court to deal with maintenance in a sole domicile jurisdiction case. The sufficient connection would invariably be proven by the jurisdiction of English domicile. What needs to be shown is that proceedings cannot be reasonably be brought, conducted or be impossible in a third, non-EU state.

Conclusion

The EU has a declared and stated objective of creating simplicity, certainty and predictability in family law matters in cross-border cases[8]. In a succession of family law legislation it has created the exact opposite. Cynics might quite rightly suspect the EU family law policymakers of being conspiratorially in cohorts with family lawyers because they are making the law, the process and the procedure so complicated. In fact, very many family lawyers condemn the EU in its legislation in family matters as being against opportunities to settle, to mediate, to reconcile and to resolve quickly and cheaply.

Only time will tell if England will deal with maintenance claims if there is only a sole domicile divorce petition. For English lawyers, this means only a reliable decided case from one of the higher courts will tell us the answer. In the meantime it is highly unsatisfactory for international families. Wherever possible it is wise to plead habitual residence even though this might be suspect, with sole domicile as a secondary alternative. When no other non-EU competent jurisdiction can deal with maintenance, there is power within the EU legislation for England to deal with maintenance and this power should be exercised and tested. The English family courts are likely to take on this power frequently if required to produce fairness and justice in a case before it.

In the meantime the housewife in Hamburg seeking to pursue €6000 arrears of maintenance against the husband and father of her children in Bordeaux or elsewhere in Europe may well find herself paying to lawyers significantly in excess of those arrears in order for her lawyers to find a way through the complexities from the EU of EU family law legislation

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[8] see also Art 81 Treaty of Lisbon.

CASE NOTE – Visitation rights and social motherhood. Spanish Supreme Court ruling 12 May 2011

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When a same-sex female couple breaks up, and one of the women has had a child through assisted reproduction, may the non-biological partner claim visiting rights[1] with the child? This arose in a recent case brought to the Spanish Supreme Court. Several issues were raised as to the theoretical basis of this claim and, more importantly, the content, duration and frequency of these personal visiting rights.

1. The facts

Zaida and Lucia were a same-sex unmarried couple from January 1996 to June 2006. On 13 November 2003, Lucia gave birth to a boy through artificial insemination. The couple broke up in 2006, and Zaida claimed visiting rights. The court of first instance awarded such rights, based on the fact that from the moment of birth Zaida had held the role of mother to the child, therefore the child had had two mothers, and the relationship with Zaida was beneficial for the child.

The biological mother appealed claiming that the social mother had no legal bond with the child and therefore was not entitled to claim visiting rights, but, if anything, could claim a personal relationship, as any other relative or close person. The Court of Appeal stated that visiting rights could not be interpreted in a restrictive manner and since these were proved to be beneficial for the child, must be upheld. The Supreme Court, in a ruling of 12 May 2011, confirmed the judgment of the Court of Appeal, but not the legal basis. The arguments used were threefold: the protection of the family, the interests of the child, and the right of the child to interact with its relatives.

2. The legal arguments

2.1. Protection of the family

The 1978 Spanish Constitution states that "the public authorities ensure the social, economic and legal protection of the family" and requires assistance to children "born within or out of wedlock, during their childhood and where otherwise legally appropriate" (article 39 CE). Families protected within the constitutional context are not limited to traditional married families but include other family structures such as unmarried couples, single parenthood and childless couples, as the Spanish Constitutional Court has recognised (ruling 47/1993, 8 February and ruling 116/1999, 17 June).

The Supreme Court stated in the ruling of 12 May 2011 that the family system is plural from a constitutional perspective, i.e. a family is a group of people who cohabit, regardless of the manner in which they have formalised their relationship (marriage or cohabitation partners), and regardless of their gender or sexual orientation. Distinctions can be made as regards the effects of such relationships, depending on the parties being married or not, or if they have children in common, etc, but in any case, same sex partners, married or unmarried, do constitute a family unit.

The ruling includes a reference to the right to respect for one's private and family life, established in article 8 of the European Convention of Human Rights. This implies not only that the State must abstain from interfering with family life, but also must act as to ensure conditions to allow such relationships to develop normally, as the European Court of Human Rights has concluded, in rulings of 13 July 2000 (*Scozzari y Giunta v. Italy*) and 28 September 2007 (the case of *Wagner y J.M.W.L v. Luxembourg*). Family life presupposes the existence of a family unit, and is not limited to a matrimonial unit, as the ECHR has held. (See the ruling of 13 June 1979 in the case *Marckx v. Bélgica*, the ruling of 16 November 1999 in the case *E.P. v. Italia*, and of 11 October 2001, in the case of *Sommerfeld v. Alemania*).

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[1] "Contact" in England and Wales

2.2. The right of the child to interact with persons close to it.

There is a distinction in Spanish legislation as regards visiting rights between parent and child (article 94 Spanish Civil Code) and personal relationships between the child and other relatives (article 160 Spanish Civil Code, which include "grandparents and other close relations"). In the present case Zaida, the partner of the biological and legal mother, has no legal link with the child. In the absence of any legal link or relationship in such a case, there is another one which is emotional and social, where during the first three years of the minor's life the biological mother's partner had exerted (along with the biological mother) the social role of mother. The issue, therefore, is whether the social mother can retain a personal relationship with the child, despite opposition from the legal mother, once the couple breaks up.

Spanish legal scholars and case law have generally assumed that the content and duration of personal relationships with close relations are not as comprehensive as those with parents (discussion focussing mainly on the possibility of spending the night away). That explains why pigeonholing the right is deemed important, given the notion that relations with close relations are not as far-reaching as with parents. Therefore the main discussion lies in framing the personal relation's right as within article 160 of the Civil Code.

The Spanish Supreme Court ruling makes it clear that a distinction should be made, and maintained, between "visiting rights", which applies only to legal parents and their children, and other personal relationships, such as the one Zaida and the child share, which may be included in the expression "personal relationships" used in article 160.2 of the Civil Code, which is deemed applicable. Once having said that, the ruling rejects the consequences that traditionally have been attached to the distinction. It allows the social mother a right within article 160.2 of the Civil Code (for which Zaida is in a close personal relationship), but does not limit the content of those visits, as they coincide with what the legal parent usually obtains: that is, alternate weekends, from 5.30 pm on Friday to 7 pm on Sunday; Tuesday and Thursday from 5.30 pm to 7 pm, as well as half of all school holidays. In summary, the legal terms used do not predetermine the content and extent of the right.

2.3. The child's best interest

The need to confirm the relationship between Zaida and the child is justified in the best interest of the child. This is a matter which is to be decided by the court, and the ruling identified some of the criteria to be taken into account when assessing this issue. Among them, "(a) the personal situation of the child and the person with whom he wishes to have a relationship;(b) the psychological reports made, if any; (c) the intensity of the relationship, prior to the claim; (d) the respect and non invasion of the relationship between the child and the custodial parent (or parents) and (e) in general, any criteria that is in the child's best interest".

3. Final comments

This ruling is the first chance the Spanish Supreme Court has had to analyse a situation such as this one. The main conclusion is twofold. First, the concept of "close relations" includes the biological mother's same-sex partner; secondly, and most importantly, courts may establish visiting rights according to the circumstances of the case and the best interest of the child, which may include the same content and extent as that usually awarded to parents. Once the couple breaks up, social motherhood may have similar effects to those of legal motherhood with regard to personal relationship with the child, (since Zaida had been a social mother since the birth of the child). The Supreme Court has avoided using the expression "social motherhood" (the Court of Appeal acknowledged a wish to avoid such reference) but nonetheless, it seems undoubted that the courts have taken into account the role (obviously, a social one) that Zaida played in the child's life in order to recognise such a wide-reaching personal relationship.

Service of Family Proceedings in Dubai and the United Arab Emirates

Alexandra Tribe*

Rule 6.43 of the Family Procedure Rules 2010 requires that service of court papers abroad must take place:

1. In accordance with the Service Regulation (Regulation (EC) No 1393/2007); or
2. Through foreign governments, judicial authorities and British Consular authorities; or
3. In accordance with the laws of Dubai in relation to service.

Service in accordance with the Service Regulation is not possible on another party in Dubai or elsewhere in the United Arab Emirates as they are not member states of the European Union.

Service through the UK Foreign Office is complicated and involves many delays. As at April 2012 the relevant section of the High Court in London was quoting upwards of 8 months to effect service.

The third option is to serve in accordance with the laws in Dubai. All issued Court proceedings in Dubai are served directly by the Court staff or Court notaries. Guidance is given at Articles 1 to 10 of the Federal Law No 11 for the year 1992. These articles set out how service (announcement) takes place through the Dubai Courts. Although the laws do not specify how foreign proceedings should be served, they helpfully elaborate on permitted methods of service in Dubai.

It is clear from these laws that documents are deemed effectively served as long as they have been delivered to the Respondent after 7am and before 6pm (Article 6) and not on official vacation days (Fridays or public holidays). Article 8 sets out how service can take place if the Respondent cannot be found. Although service of court documents in Dubai is carried out by the Courts, it appears from these statutory provisions that service is effective as long as the Respondent has notice of the proceedings. It therefore appears that personal service of English divorce proceedings would be service in accordance with the laws in Dubai subject to due compliance with articles 6 to 8 of the Federal Law 11 of 1992. Personal service of court documents can, and often does, take place in Dubai by courier delivery.

Another option is to request the Dubai Court Notaries to serve English Court documents on a Respondent in Dubai. The Court Notaries have their own section on the Dubai Court website (www.dubaiCourts.gove.ae). The Dubai Court Notaries are however likely to insist that all documents are translated into Arabic and this can add considerably to the legal costs.

We have had success in obtaining an English court order permitting due service of English divorce papers on a party in Dubai by methods compliant with local Dubai law.

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University responses to forced marriage and violence against women in the UK: Report on a pilot study •

Marilyn Freeman* & Renate C.A. Klein**

Acknowledgements

The authors acknowledge with gratitude the assistance and support of other academics in conducting this research project, in particular Zoe Swan and Frances Burton. Our great appreciation is also expressed to Paul Formosa, the research assistant on this project, the Forced Marriage Unit, the university management who supported this research and everybody who agreed to be interviewed.

1. Summary

Violence against women (VAW) and forced marriage (FM) affect students in post-secondary education but little is known about how these issues present to staff working at colleges and universities and how the institutions respond. The purpose of this pilot study was to gather initial evidence about these matters and explore how institutional responses can be enhanced, considering both internal procedures and links with specialist services in the community.

We use the term post-secondary education as an umbrella term for higher education universities and colleges, and further education colleges. The term higher education institutions (HEIs) is used mostly in reference to UK institutions that typically draw students 18 years and older and prepare them for professional or research-oriented jobs. Further education (FE) colleges refers to UK institutions that typically draw students 16 to 18 years old and prepare them for vocational and technical jobs. In addition, we use the terms universities and colleges interchangeably when referring to HEIs in the United States, which we do on occasion for comparative purposes. We use the different terms in order to acknowledge the variety of legal, social and cultural contexts post-secondary education institutions constitute.

This report is informed by feedback gathered in 16 stakeholder interviews with staff at two HEIs in the southeast of England, local police officers, and local community-based specialist service providers[1].

Data collection was restricted to two HEIs, due to the exploratory nature of this research and the limited financial support and time-frame we had available for securing institutional participation.

Note that students were not interviewed as our main focus in this pilot study was on staff and institutional perspectives. The pilot study used a small non-random sample, which may not necessarily be representative of HEIs in the UK. Nonetheless, we believe that the evidence gathered is useful and can inform university policy and future research in this area. This report presents aggregated findings across the two participating HEIs.

We found that individual front line staff members see up to 15 cases per year of VAW students, mostly domestic violence but also sexual assault, and cases in which family members other than an intimate partner abuse the student. Cases of FM appear to be almost invisible to university staff but specialist service providers in the community stated that they worked with victims of FM who were students.

The 'institutional response' appeared to be a matter of individual staff member expertise and commitment. Systematic institutional policies or response protocols dedicated to the issues were lacking. Managerial support

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• This Report is a joint report of the Centre for Family Law and Practice and the Child and Woman Abuse Studies Unit (CWASU).

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[1] Specialist service providers refers to organisations that specialise in working with women (and men) affected by VAW and/or FM such as domestic violence project and rape crisis centres, and organisations that work with Black and Minority Ethnic (BME) women in the UK, or those dealing specifically with potential and actual victims of FM.

for front line staff varied considerably; acquiring specialised training depended on individual staff motivation and the supportiveness of individual line managers. Referrals within the HEIs were not formalised but appeared to work well within the immediate peer context of front line staff; referrals to community-based services were not formalised and depended on how well individual staff knew the local community and relevant national services and resources. Staff members expressed interest in more specific training on VAW/FM and on cultural sensitivity.

2. Policy and research context for the pilot study

2.1 Policy context

The pilot study addresses forced marriage within the broader problem of violence against women, following recent research and the recommendations of the End Violence Against Women Coalition[2] and the UK government's strategy for ending violence against women and girls[3]. The UK Department of Education also adopted this perspective, in which forced marriage is included within a broader definition of violence against women[4].

The UK government's 2011 action plan on violence against women and girls noted that colleges "can play a vital role" in prevention (see fn 3, p. 8). While the plan seems to view this role primarily in terms of teaching young people about healthy relationships, we suggest that HEIs have a broader responsibility to students. We know from this pilot study, recent UK research (see next section) as well as international research that victims and survivors disclose VAW/FM to HE staff (mostly to frontline student services but also to teaching staff[5]). Furthermore, as we detail in sections 2.2 and 2.3 below, VAW disproportionately affects female students, and FM disproportionately affects students from backgrounds where FM may be prevalent. Both VAW and FM can severely challenge or even end students' ability to pursue education[6]. In addition, support with these issues may require specialised knowledge and skills because of the complex interpersonal and social dynamics of these abuses and because the likely presence of perpetrators within students' family or social networks creates particular risks to students' safety and well-being[7]. Finally, HEIs fall within the public sector equality duty (set out in section 149 Equality Act, 2010) toward protected groups based on religion or belief, sex, and sexual orientation that came into force in England, Scotland, and Wales on 5 April 2011 (with specific duty regulations for England 10 September 2011), and which concerns the elimination of unlawful discrimination, harassment, and victimisation, and the enhancement of equality of opportunity.

Furthermore, under the Forced Marriage (Civil Protection) Act 2007 a person can get a forced marriage protection order (FMPO). An FMPO can be applied for by the victim, a relevant third party, or with the leave of the court, any other person. Any other person could include someone from student services, which implies that reporting of FM at HEIs is an important issue. In addition, local authorities are relevant third parties who do not need the prior leave of the court to make an application for a FMPO, which means that HEIs working in partnership with local authorities is also important in this context.

As we will show in the next section VAW/FM not only present as problems within post-secondary education but also affect some students disproportionately. The current policy context urges educational institutions to be aware of these issues and properly prepared to address them, and those who fall within the public sector equality provisions are challenged to meet their duties accordingly. In particular, this may be an issue of what

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2 Gill, A. & Anitha, S. (2011). *Forced marriage: Introducing a social justice and human rights perspective*. London: Zed Books. And Coy, M., Lovett, J. & Kelly, L. (2008). *Realising rights, fulfilling obligations: A template for an integrated strategy on violence against women for the UK*. London: End Violence Against Women.

3 http://www.homeoffice.gov.uk/publications/crime/call-end-violence-women-girls/vawg-action-plan?view=Binary

4 http://www.education.gov.uk/childrenandyoungpeople/healthandwellbeing/safeguardingchildren/a0072231/forced-marriage [retrieved 23 March 2012].

5 Branch, K.A., Hayes-Smith, R., & Richards, T.N. (2011). Professors' experiences with student disclosures of sexual assault and intimate partner violence: How "helping" students can inform teaching practices. *Feminist Criminology, 6*(1), 54-75.

6 Horsman, J. (2006). Moving beyond "stupid": Taking account of the impact of violence on women's learning. *International Journal of Educational Development, 26*(2), 177-188.

7 The UK's Forced Marriage Unit gives specific guidance at http://www.fco.gov.uk/en/travel-and-living-abroad/when-things-go-wrong/ forced-marriage/info-for-professionals; see also Ely, G.E. & Faherty, C. (2009). Intimate partner violence. In J.T. Andrade (Ed.), *Handbook of violence risk assessment and treatment: New approaches for mental health professionals* (pp. 157-177). New York, NY: Springer.

the equality duty terms "indirect discrimination"[8], in which an institutional policy or practice, for instance about offering generic student support services, is applied to all students but may not sufficiently address the specific needs of students dealing with VAW/FM.

This suggests to us that post-secondary education is called upon to become more aware of VAW/ FM and take steps to address the specific needs of victims and survivors such as through specialised training for frontline support staff and more systematic referral practices to specialist services in the community.

2.2 Research on domestic violence, sexual assault and sexual harassment against female students

In the UK, attention to students as victims of VAW/FM has been intermittent with little systematic research in this area, compared to the U.S. and Canada where universities have been addressing rape and sexual assault on campus since the 1980s[9] (and more recently, driven by Congressional legislation and significant funding, other forms of abuse such as domestic and dating violence and stalking, although attention to FM is relatively rare[10]). However, in the UK this situation is changing and research on violence against female students, in particular, is (re)emerging as an area of research and policy[11].

In 2010 the National Union of Students (NUS) released the first UK-wide study of women students' experiences of abuse[12]. The NUS survey estimated that 1 in 7 (14%) women students have experienced a serious physical or sexual assault while a student at university; 12% have been stalked; 16% experienced unwanted kissing, touching or molesting; and over 10% were a victim of serious physical violence. 68% of women students reported one or more kinds of sexual harassment on campus during their time as a student (a similar survey was recently undertaken in Australia[13]).

The NUS UK survey provides a base line estimate, which universities can use to gauge how many of their female students may experience some form of abuse while at university. To arrive at such an estimate the NUS percentages can be extrapolated (see Fisher, Cullen & Turner, 2000[14] for an example of such extrapolation). For instance, based on the NUS survey's 14% estimate of female students who experience a serious physical or sexual assault while at university, one would expect that per 10,000 female students, approximately 1,400 may experience a serious physical or sexual assault.

The NUS survey found that most perpetrators were other students known to the victim. Consistent with similar findings in violence against women and criminology research the vast majority of instances were never formally reported[15]. The NUS study also found that only 10% of women who were seriously sexually assaulted reported the assault to the police. Of the 90% of women who did not report serious sexual assault to police about half did not report because they felt ashamed or embarrassed, and slightly less than half did not report because they feared they would be blamed.

The NUS report also found that only 4% of women who were seriously sexually assaulted reported the assault to their university. As we explain in detail in section 5.1.3 these data suggest that the actual prevalence of VAW students is severely underreported, with most cases never coming to the attention of university staff, and that many victims and survivors may therefore miss out on support from their HEI. This might mean that they receive no support at all because they may not have the opportunity to report elsewhere as their educational studies might provide them with the only viable opportunity to report and seek support as it may be one of the only places where they are able to attend and speak freely.

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8 Guidance document available at http://www.equalityhumanrights.com/advice-and-guidance/new-equality-act-guidance/equality-actguidance-downloads/.

9 Karjane, H.M., Fisher, B.S., & Cullen, F.T. (2006). *Sexual assault on campus: What colleges and universities are doing about it*. Office of Justice Programs. U.S. Department of Justice.

10 http://www.calcasa.org/category/campus; http://www.ovw.usdoj.gov/ovwgrantprograms.htm [both retrieved 1 March 2012].

11 Phipps,A. & Smith, G. (2012). Violence against women students in the UK: Time to take action. *Gender and Education, 24*(2). 1-17.

12 NUS (2010). *Hidden marks: A study of women students' experiences of harassment, stalking, violence and sexual assault*. National Union of Students.

13 Sloane, C. & Fitzpatrick, K. (2011). Talk about it survey. National Union of Students (Australia).

14 Fisher, B.S., Cullen, F.T., & Turner, M.G. (2000). *The sexual victimization of college women*. Research report. U.S. Department of Justice, National Institute of Justice, Bureau of Justice Statistics.

15 Fisher et al. (2000). Ullman, S.E. (2010). *Talking about sexual assault: Society's response to survivors*. Washington, DC: American Psychological Association. Smith, K., Coleman, K., Eder S., & Hall, P. (2011). *Homicides, firearm offences, and intimate violence 2009/10*-Supplementary volume 2 to Crime in England and Wales. Home Office Statistical Bulletin, 01/2011.

2.3 Research on forced marriage

The empirical context of this pilot study is also informed by work on FM because the majority of victims of FM are young women in the traditional age bracket for attendance at FEIs or HEIs. According to the Forced Marriage Unit (FMU), a joint initiative of the Foreign & Commonwealth Office and the Home Office, in 2011 (the most recent FMU statistics available), the FMU gave advice or support on 1,468 cases related to FM. The majority of victims (63%) were between 16 and 25 years old (that is, within the traditional FE to HE age bracket). Seventy-eight percent of victims were female; 22% were male[16].

Similarly, based on a survey of local and national organisations addressing FM the National Centre for Social Research (NCSR) estimated that in 2008 there were between 5,000 and 8,000 cases of FM in the UK (96% female victims; 4% male victims). Of these, 26% concerned victims 16 to 17 years old, 40% concerned victims 18 to 23 years old, and 20% concerned victims 24 and older, which means that over 60% were in the age bracket of HE and FE students.[17] (The FMU and NCSR data are based on reported cases and possibly underestimate the actual prevalence of FM in the UK as many are likely to be unreported.)

Thus, although FM prevalence data specifically for students is lacking (the NUS survey did not address FM), the data from the FMU and the NCSR suggest that a significant number of FM cases involve victims who are in the age bracket for FE and HE students.

Furthermore, most of these victims are likely to be young women, and they are likely to come from specific ethnic backgrounds. In the 2011 FMU statistics 70% of the cases involved families from South Asian communities (2008 FMU statistics as well as the NCSR data suggest that over 90% of cases were from South Asian communities). Thus, FM is likely to affect in particular a subgroup of young people at the typical age where they would enter into or be in post-secondary education (young women from South Asian backgrounds). This has implications for the equality duty of public education institutions as they ought to avoid indirect discrimination based on, among several categories, gender and ethnic background.

The FMU statistics quoted above show that in 2011 around 925 of the cases the FMU was aware of involved 16–25 year olds. These are young people in the FE and HE age bracket. FM-related issues may have prevented them from entering post-secondary education in the first place, but if they did enter, they probably would have struggled with these issues while at university. However, as seen in 5.1.3 below, cases of FM rarely are seen in the HE context. This suggests two problematic scenarios.

One is that FM prevents some young people from entering post-secondary education altogether. The other is that FM may be nearly invisible in this context and students struggling with it may miss out on a potentially important source of support. This would be all the more troubling if colleges and universities were one of the social contexts young people struggling with FM were still allowed to enter.

3. Research questions

Our research questions were informed by the findings about VAW and FM reported above. These suggest that violence against female students is common but mostly underreported and therefore nearly invisible to HEIs, which may be even more pronounced with regard to FM. Therefore, our primary research questions were:

- How do issues related to FM and VAW present to university staff?
- How do the institutions respond?
- How could these responses be strengthened?

4. Methodology

The conceptual framework for this study is informed by the national and international research literature and relevant policy. Our framing of "institutional response" is informed by comprehensive campus approaches of the type that have been developed in particular in the U.S. over the past years and with which Prof. Klein has had several years of experience[18]. In addition, we took the UK VAW policy context into account as described above and sought advice from the FMU and specialist service providers.

The stakeholders of interest for this study included front line staff at the HEIs (defined as those who provide direct support to students whether in student services or pastoral care contexts or any other contexts, e.g. debt advisers), other HEI staff (teaching staff, managers), local

[16] Statistics obtained from the FMU.

[17] Kazimirski, A, Keogh, P., Kumari, V. et al. (2009). *Forced marriage: Prevalence and service response*. National Centre for Social Research.

[18] See also http://www.umaine.edu/safecampusproject/ and http://calcasa.org/category/campus/.

police officers dealing with VAW/FM, and specialist service providers in the community. The framing of the interview questions made it clear that VAW and FM were included within the remit of the questions and this was also brought to the attention of the interviewees. In addition, the framing also made clear the disproportionality of VAW and FM, while indicating that incidents of violence against men or FM involving men, if any, were similarly within the remit of the interviews.

A research assistant (RA) contacted the stakeholders and set up interviews. Interviews with frontline and teaching staff focused on how issues of VAW/FM present and how staff responses can be enhanced, including internal procedures and referrals to specialist services. Interviews with management focused on institutional structures and commitments. Interviews with staff at specialist service providers focused on working relationships between service providers and HEIs, referral practices, gaps in services, and ways to integrate universities into multi-agency systems.

Interviews were undertaken face-to-face and over the phone. Each interview followed the question format given in Table 1 (shown on p.37). Interviews were not recorded but instead the RA took notes, which were reviewed and discussed with him by Prof. Freeman and Prof. Klein. The specific findings from these interviews were then set into, and interpreted within, a broader empirical context as it emerges from the UK research discussed above and the pertinent international literature.

5. Findings

5.1 How do issues related to FM and VAW present in university contexts?

This will be addressed under three headings: Access and disclosure, complexity of issues, and visibility of the problem.

5.1.1 Access and disclosure

We found that about 50% to 80% of students who sought support approach front line staff directly and on their own initiative; the others came to front line staff through various routes, including referrals from other student services staff, tutors, or teaching staff, suggestion by another student; chance meetings on campus; or after informal outreach.

Students usually came alone to speak to frontline staff; in a few cases a friend accompanied them.

There may be a time lapse between a VAW incident and the victim's decision to turn to HEI support (one interviewee estimated this time lapse at about two months).

Front line staff did not always use a systematic process to gauge the effect of their services on students. Some staff members relied on verbal feedback of how a student felt after meeting with the staff member. Other staff members used standardised questionnaires about students' feelings and levels of mental health. Many individual front line staff said they followed up on a case by case basis to see how a student was doing. All front line staff had the impression that the students who came to them were satisfied with the support they received. This is consistent with a finding in the UK NUS survey that the few students who did seek support from the university said they were satisfied with what they received. We believe this is an encouraging convergence of findings that speaks to the importance of student support services. We also think this suggests that such services have untapped potential in that they would benefit more students if VAW and FM were acknowledged more widely, resource information was prominently displayed on HEI premises, disclosure of abuse encouraged, and existing student support services were enhanced through specialised staff training and a more systematic approach to making referrals to specialist agencies in the community.

Students rarely disclosed abuse at the beginning of a conversation but "it ekes out once you gain their trust". Usually, other problems were brought up initially (or were the reason a student was referred) such as falling behind academically, missing classes, or having financial problems. Conversation about these presenting problems may reveal underlying issues of abuse. That does not mean, however, that students avoided talking about abuse. When the atmosphere was right and abuse addressed directly students talked about it.

5.1.2 Complexity of issues

Many interviewees saw the cases that came to their attention as complex and often involving multiple traumas. Those experiences of abuse that came to the attention of staff were usually part of a bigger story of struggles against vulnerability and hardship. Such cases included patterns of:

- Domestic violence from an abusive partner or husband
- Trying to leave a domestically abusive relationship while providing for a child

- Exploitation and abuse of a student economically dependent on relatives
- Psychological abuse from father and physical abuse from brother
- Ostracism from parents because student had an abortion
- Students struggling where parents hold conservative faith perspectives
- Husband initiates or escalates abuse when student is at or returns to university
- Chronic injuries and illness due to abuse from father
- History of abuse as child or growing up witnessing violence
- Multiple abusive relationships (abuse from family members and intimate partners)
- Risk of abuse against students' children with associated complexities of navigating the often "contradictory legal worlds"[19] of domestic violence services and children's services
- Cases with ongoing litigation that may interfere with provision of support
- Woman may be in the UK on a marriage visa and fear deportation when separating from abusive husband
- Physical violence in context of FM
- Split loyalties toward family/husband; dependence on family/husband
- Mental health problems as symptoms of pressure, exploitation, and abuse
- Emotional and psychological abuse, often escalating into physical abuse.

Many interviewees saw different forms of VAW as interrelated (in particular links between emotional abuse and other forms of abuse, and emotional abuse as precursor to other forms of abuse).

5.1.3 Visibility of the problem

We found that individual front line staff saw up to 15 cases per year of VAW students (depending on the front line staff this was up to 50% of the entire case load; for other staff VAW cases were a smaller proportion of their case load). These were mostly cases of domestic violence in which a husband or boyfriend abused the student, but also sexual assaults, and cases in which relatives abused the student. Cases of FM appeared to be almost invisible to university staff but one specialist service provider in the community said that last year they worked with about three students threatened by FM.

Table 2 (on pp 38-39) summarises the number and type of cases of VAW/FM seen that involved students.

The figures in Table 2 reflect estimates by the interviewees of the number of cases in which students disclosed VAW/FM to service providers or authorities, or HEIs. There are two ways to interpret these figures. One is to equate the low number of disclosures with the size of the problem at HEI, in which case one would conclude that there is very little VAW/FM against students at university. This is almost certainly wrong.

The other way to interpret the figures in Table 2 is in the context of a base rate estimate. The best such estimate to date seems to come from the NUS report (see fn 12 supra). Extrapolating from the NUS report, if 14% of female students experience a serious physical or sexual assault while at university, this would mean that over the course of 4-5 years (the average length of time students spend at university) there may be 1,400 cases in a population of 10,000 female students. The HEIs that participated in this pilot study both have female degree student populations in the range of 12,000-14,000[20]. Thus, the hypothetical extrapolation to 10,000 female students is meaningful and case numbers derived from it could be viewed as lower bound estimates.

Continuing along this line of reasoning, if 4% of 1,400 female students who were assaulted reported this assault to university staff (we use the 4% figure as this is the relevant figure found in the NUS survey of those who reported serious assault to their educational institutions) there might be about 56 reports over 4-5 years. This figure of 56 reports is quite consistent with the higher case loads some ofour interviewees reported: case loads of 12-15 VAW cases per year would translate into 48-60 cases over four years.

One can draw three cautious conclusions from this. One, the 4% NUS study estimate of reported assaults is consistent with case loads reported by some of our interviewees. Two, this consistency may be limited to ideal circumstances in which a frontline staff person can provide confidential service, has specialist VAW experience, and probably has been able to build good rapport with students over many years of service. Three, even under such ideal circumstances only a small fraction of likely cases of serious assault ever come to the attention of HEIs, while up to 96% of serious assaults

[19] Hester, M. (2009). The contradictory legal worlds faced by domestic violence victims. In E. Stark & E. Buzawa (Eds.), *Violence against women in families and relationships: Making and breaking connections* (pp. 127-146). New York: Praeger.

[20] UCAS data for 2012, www.ucas.com, retrieved 1 March 2012.

may be invisible to HEI's.

5.2 How do institutions respond and how could these responses be strengthened?

From the feedback we obtained in this study it appears that the institutional response is up to the expertise, determination, and commitment of individual frontline staff. The HEIs had no specific services for VAW/FM but provided general support through counsellors, advice workers, and chaplains. Our interviewees were not aware of systematic institutional policies and procedures addressing VAW/ FM.

An 'institutional response' can be thought of as comprising multiple levels from core priority to individual staff training and information strategy. These levels are suggested by current best practice models for VAW intervention and the emergence of 'whole domain' approaches, in which an institution such as a school or university makes its contribution to intervention one of its core responsibilities[21].

One example of such a comprehensive approach, the 'spectrum of prevention', includes six areas where institutions can take initiative, from "strengthening individual knowledge and skills; [to] promoting community education; educating providers; fostering coalitions and networks; changing organizational practices; [and] influencing policy and legislation"[22]. Applied to the post-secondary education context, we submit that a comprehensive institutional response should include the following:

(1) Institution recognises its contribution to intervention/prevention as one of its core responsibilities;
(2) Institution is integrated into local multi-agency working with community-based specialist service providers, law enforcement and others;
(3) Institution has written policies and response protocols that give specific guidance on steps to take when students disclose VAW/FM;
(4) Institution offers consistent support for front line staff from line managers;
(5) Institution encourages specialised training on VAW/FM through continued professional development;
(6) Institution offers consistent and easily accessible institution-wide information about VAW/FM.

We used these aspects of a required institutional response as a template for organising our discussion of feedback from the interviews which we summarise below. The "what staff want" sections within each section are distillations of the various comments scattered throughout the individual interviews, which we have organised under the individual headings of required institutional response.

5.2.1 Contribution to intervention as core responsibility for HEI

Perhaps the traditional view of HEIs' role in regard to VAW/FM is reflected in the comment of one interviewee that HEIs are sympathetic but can do only so much because they are HEIs. This view is reminiscent of comments documented in a corporate survey in the U.S. from the early 1990s, in which human resource personnel and managers said that domestic violence was a problem for their companies that affected their bottom line but that responsibility for dealing with this problem lay with the local domestic violence projects[23]. We are not arguing that HEIs should be expected to make VAW/FM go away, but rather that they need to recognise HEI-specific opportunities to contribute to intervention and prevention. This requires a shift in perspective.

First, HEIs need to see VAW/FM as problems that directly affect their own students, not merely be aware of VAW/FM as societal problems elsewhere (VAW also affects employees, but the focus in this pilot study is on HEI responses to students in these matters). HEIs have specific legal duties towards students, such as the Equality Duty, in addition to wanting students to do well academically. Thus, HEIs need to make their contribution to intervention and prevention of VAW/FM a core organisational responsibility, not something that is optional. While education or research may be the central mission of an HEI, pursuit of this mission is possible only when core responsibilities for safe and supportive learning and teaching environments are assumed (as fire and building safety and public health considerations are core responsibilities).

Second, HEIs need to address the crippling underreporting in this area. The practice experience in the

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[21] Twemlow, S.W., Fonagy, P., & Sacco, F.C. (2004). The role of the bystander in the social architecture of bullying and violence in schools and communities. In J. Devine et al. (Eds.), *Youth violence: Scientific approaches to prevention* (pp. 215-232). New York: New York Academy of Sciences.

[22] Cohen, L. & Swift, S. (1999). The Spectrum of Prevention: Developing a comprehensive approach to injury prevention. *Injury Prevention, 5*, 203-207. Also available through http://www.preventioninstitute.org/index.php?option=com_jlibrary&view=article&id=105&Itemid=127 [retrieved 22 March 2012].

[23] Roper Starch Worldwide for Liz Claiborne (1994). *Addressing Domestic Violence: A Corporate Response*. New York: Roper Starch.

VAW field suggests that victims and survivors come forward when they feel that the benefits of disclosure will outweigh the risks[24]. Risks include fear of not being believed or dismissed, fear of retribution, and fear that neither help nor justice will come of telling the institution. Benefits of disclosure include being able to talk about troubling issues, getting emotional support and validation, and findings one's way to further resources, which in turn may help end or escape abusive contexts.

What staff want:

- Clear commitment from deans, management, and governors to the well-being of students disproportionately exposed to risk of abuse
- Acknowledgement that students' life outside HEI affects their studies and academic success
- Series of roundtables to get staff involved and interested
- Ongoing policy response or women's safety working group looking at staff and student welfare (confidentiality and cultural awareness are essential; HEIs could bring in specialist service providers

or consultants to help develop policy and staff training for frontline staff)

- HEI to make more of existing resources, for instance by acknowledging and supporting teams of frontline services staff that have developed strong collaborative working relationships, and by supporting staff development through more opportunities for specialised training on VAW/FM that can enhance existing expertise
- HEIs to support students by supporting the staff members who work directly with students.

5.2.2 Integration of HEI in multi-agency working

Awareness of and familiarity with specialised community resources varies considerably across staff members. Some, in particular those who have been in their posts for a longer time, have a good understanding of what is available and have forged working relationships with individual service providers in the community. Others were unaware of community resources and said they would be confident that they would find necessary resources if they were looking for them.

Among the community-based resources that staff members said they had worked with on specific cases were faith and neighbourhood teams at the Local Authority, specialised police units (such as Sapphire Unit), social services, domestic violence support services, child care services, rape crisis support, Lesbian/Gay/Bisexual/Trans support services, cultural specialist organisations, mental health team at local NHS; sexual health clinic; police; and local GPs. One staff member said that they vet external agencies (but it was not clear how this was done).

Referrals to external services seemed to rely on a few staff members known to have good connections with the community. While this system may work well for as long as such as gatekeepers remain at university, it is likely to suffer or collapse when they leave the institution.

Our interviewees indicated that the HEIs had no written protocols or formal referral procedures for multi-agency working. Instead, multi-agency working was based on word of mouth and the working relationships and judgement of individual staff members.

A few interviewees said they did not know of specific services in the community but expected them to be there and felt confident they would be able to find them if needed. This may be the case but should also be considered in the context of very uneven service provision across the UK[25]. HEI staff may overestimate the extent to which specialist services are actually in reach of their students.

Police perspective: HEIs were not seen as part of multi-agency working. Some police units have university link officers but these do not necessarily focus on VAW/FM. Referral protocols and having contact details at HEIs would be helpful (in particular for after hour contacts), for instance when creating safety plans for students living on campus. Individual police officers may think that it is irrelevant whether a victim is a student. However, support and safety may be related to the student's situation at university and finding alternate accommodation may be helped or hindered by being at university. Similarly, moving to a different area may have consequences for pursuing studies. Some students might not want police to approach university for reasons of shame and embarrassment.

Specialist VAW service provider perspective: In the caseload of one interviewee who was a communitybased

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[24] Ullman, S.E. (2010). *Talking about sexual assault: Society's response to survivors*. Washington, DC: American Psychological Association.

[25] Coy, M., Kelly, L., & Foord, J. (2007). *Map of gaps: The postcode lottery of violence against women support services in Britain*. End Violence against Women Coalition/Equality & Human Right Commission, UK.

VAW service provider only few victims were students; over a ten-year period an estimated 7% of cases each year had involved students. Another community-based service provider also saw few students in the caseload but among these few relatively more cases of young women in FEIs than in HEIs. The interviewees mentioned only one case that was referred by a university, all other referrals came from police or social services. An established referral route with HEI would be helpful. HEIs and FE colleges are important for young women as pathways toward independence. HEIs could undertake more awareness raising through leaflets and posters or by having a specialist service provider come in and talk to students and staff. HEIs should consider that female staff may also be affected by VAW/FM.

HEI staff perspective versus community-based staff perspectives: HEI staff and community-based staff may develop different perspectives on VAW/FM due to differences in which these issues present to them. For example, our findings suggest that in HEI contexts students affected by VAW/FM may initially come to the attention of staff through academic or financial problems. In contrast, when a student turns to specialist services providers (or police) for help with VAW/FM it is probably clear that these are the underlying issues. Thus, VAW/FM may be more disguised in HEI contexts and more obvious to specialist services providers/police. It is possible that in response to seeing less of the desperation students may experience (compared to agencies who tackle these issues head on), HEIs may tend towards being too complacent and too slow to refer. In addition, HEIs are also likely to be much larger than VAW specialist service providers or specialist police units, so that it may be unrealistic to expect a single contact person for VAW/FM at a large HEI. Finally, with a view on developing campus-community relationships and integrating HEIs and FEIs into multi-agency working, this also means that potential differences in experience and perspective need to be addressed so that partners in multi-agency working develop realistic assessments of each other's remit, strengths, and limitations.

5.2.3 Written institutional policies and response protocols

Interviewees were not aware of specific HEI-based written policies or protocols on how to respond to students (or staff) affected by VAW/FM. Instead, generic counselling support was available. A recent study of violence against female students at five universities in the UK and continental Europe suggests that in the HE sector policy development specifically addressing VAW students is uneven. The study found that while all five universities had resources devoted to students' well-being in general, only one institution had specific policies to address sexual violence against female students, and one had measures devoted to gender equality (such as anti-sexual harassment policies)[26].

One interviewee suggested that there is an emerging debate in the professional student services associations about these issues and university-specific policies. One of the HEIs kept a list of external support agencies on website for use by staff and students.

What staff want:

- Set system for referrals
- Set response procedures
- Set system of record keeping
- Clear information about specialised community-based resources and who can help with what
- Knowledge of the best people to refer a student to / contact numbers for specialised services

Formalised procedures take time and energy to develop but have several advantages. One is that the very process of developing them requires relationship working and raises awareness. Once in place, formalised procedures give guidance to staff on how to proceed, which is particularly helpful when turnover is high. Formalised procedures allow a more systematic assessment of what works well and where things could be improved.

However, the U.S. experience, where written policies are common, shows that just having a written policy on the books is not enough; staff members also need to be trained on the policy and its implementation needs to be monitored periodically. In addition, formal guidelines must not undermine confidentiality or create situations in which victims are discouraged from disclosure because they fear they will unleash institutional processes that might further hurt or endanger them.

Furthermore, policy language and procedures offering specific guidance on how to support students should be informed by an intersectional gender analysis. This means that while offering services to all students, institutions need to take into account that all students are not affected equally by risks of VAW/FM. Rather, the

[26] Feltes, T. et al. (2012). Gender-based violence, stalking and fear of crime. Final report to the European Commission. Directorate General Justice, Freedom and Security. http://vmrz0183.vm.ruhr-uni-bochum.de/gendercrime/ [Retrieved 28 March 2012].

life experiences and risks of victimization of students differ considerably depending on gender, and social, economic, and cultural background. Policies on VAW/FM need to be clear that most victims are female, that a minority of victims may be male (or transgender) and that circumstances can vary considerably based on class, poverty, religious or ethnic background, and age. Interviewees reported that very rarely they had a case where a male student came forward. The proportionality of cases needs to be acknowledged while designing support systems that work for all students.

In addition, the strengths and limitations of existing services may need to be considered carefully. Generic support (such as listening and counselling skills) may be very well suited to open a conversation about abuse or to address symptoms such as anxiety, inability to concentrate or falling behind academically. However, addressing issues of VAW/FM usually requires more specialised knowledge, including knowledge of the dynamics of sexual and domestic abuse perpetration, the dynamics of survivor disclosure and recovery, and of the unique life contexts of ethnic, sexual or religious minorities. In addition, the threats posed by perpetrators of VAM/FM may require careful and informed safety planning, including awareness that particular risks may arise from the social or family networks of the victim/survivor.

5.2.4 Support for individual staff by line managers and professional peers

Assessment of support with cases from line managers, or the HEI in general, roughly fell into three categories. One, staff members considered support reasonably good, and felt that the university was very positive about supporting students. Two, staff members assumed support would be good if they needed it but had not had actual experience with this. Three, staff members felt they were left to their own devices, lacked support and direction from supervisors or the institution. This last category of respondents also felt that there were no specific supports at university for staff trying to support students who experience VAW/FM; that the institutions' approach to staff development and staff training was lamentable; and that nothing about staff support was embedded in organisational procedures but depended on the mood of the supervisor or line manager.

Team meetings are an important source of advice, backup and information for individual frontline staff. Many staff members commented on how well their immediate teams worked together and what an important source of guidance, support, and information their team members were. Most frontline staff felt supported by their peers at university, in particular where there were teams of staff working together closely and where one can draw on a range of professional skills.

Many staff members also felt supported within their professional associations such as AMOSSHE (the UK Student Services organisation), National Association of Student Money Advisors (NASMA), British Association for Counselling and Psychotherapy (BACAP) or faith associations. Others did not feel supported by their professional associations or felt they were directed to policies but then left alone. Some interviewees said that support at the HEI or within professional associations varies from individual to individual.

Individual teaching staff said there was limited formal support at their HEI but that in their experience informal support from friends and colleagues has worked well in the past.

Several interviewees felt their HEI took VAW/FM seriously, whereas others (in the same HEI) thought that the institution was not taking the issues seriously. Some thought that their HEI was sensitive to issues of VAW/FM but could not elaborate what that meant. Others felt it was difficult to say how supportive the HEI was.

One interviewee felt that it was a sign that an HEI takes serious the welfare of its students when the student services department is well-resourced and visible and thus better able to support students through a range of issues including visas, debt advice and counselling.

One interviewee pointed out that the HEI was supportive but might not know what really is going on for students. Low levels of reported cases and perceived student satisfaction with support received might mean that VAW/FM do not appear on HEI agendas as urgent problems in need of solution. One interviewee said that having about 5% of the student population using counselling at the HEI meant that counselling was a "well-used service".

We believe that these last comments warrant further attention. If a use rate of 5% means that a service is well-used, then services for even relatively small percentages of students are worthwhile services that contribute to the well-being of the entire student population. In addition, if institutions were to enhance student well-being even further, for instance by acknowledging the significance of VAW/FM and encouraging students to come forward and utilise frontline support services, then implications for staff capacity and resourcing need to be considered, as evidenced by the comment of the

interviewee who observed the importance of a well-resourced student services department.

This may include more opportunities for specialised staff training but may also mean that extra or dedicated staff may be necessary. The financial implications may not be particularly significant, but need to be considered.

What staff want:

- More consistent personal and peer support
- More support from line managers
- More opportunity to network with peers who do similar jobs
- Outside trainers brought in to help address challenging issues
- Better communication between academic staff and students services staff (and alerting academic staff to the potential reasons for sudden changes in performance or attendance so that referrals to student services are more quickly and easily undertaken)
- More awareness about VAW/FM for early identification and prompt referral
- More awareness of training opportunities

5.2.5 Specialised professional development for individual front line support staff

The kind of support that interviewees had offered students included confidential listening, nonjudgemental listening, referrals to other services, contacting people on students' behalf, making arrangements for further support, financial, debt and welfare advice; accompanying students to meetings or appointments, following up with students on how they were doing after crisis intervention.

All frontline staff felt they had generic listening and support skills; a few said they had specialised training, for instance about mental health issues, or rape crisis support. Among teaching staff some said they had no specialised training and were not aware of any training on offer. Some frontline staff said they felt confident that they would be able to handle any case that comes to them; others said they felt less than confident and often at a loss what best to do. Some saw themselves as generalists able to link students to specialised services.

Self-confidence can be a reflection of having supported students successfully in the past, but it can also be a sign of over-confidence and lack of awareness of unique challenges in cases of VAW/FM. Selfconfidence needs reality checks. Dealing with cases of VAW/FM often requires specific knowledge of the dynamics of domestic violence, sexual assault, sexual harassment or FM. Seemingly innocuous or well-meaning actions can lead to major mistakes.

Sexual and domestic violence, as well as FM and "honour-based violence" are much specialised areas and the problems they pose may challenge generic counselling skills. Professionals with highly developed skills in other areas may not always realise this, and may do more harm than good without specific training or a clear understanding where their limits are.

The dynamics underlying sexual and domestic violence are not always well understood beyond specialist services providers and specially trained police officers. Myths and victim-blaming continue to be widespread, and mindless critical or blaming responses to a student's disclosure of abuse can amount to secondary victimisation[27]. With regard to domestic violence, the risks posed by determined perpetrators can be considerable so that good safety planning is paramount[28]. In cases of "honourbased violence" or FM, a well-meant effort to include a student's family in addressing the issues may further endanger her[29]. Recent government publications directed at professionals in the education and health care sectors have warned in particular against attempts to resolve cases of FM through family counselling or mediation. Those assisting somebody where FM is suspected "should bear in mind that mediation as a response to forced marriage can be extremely dangerous." (see fn 7 supra).

Similarly, forced marriage "should not be viewed as a 'generational or culture clash' that can be solved by mediation. Mediation, reconciliation and family counselling as a response to forced marriage can be extremely dangerous … There have been cases of women being murdered whilst mediation was being undertaken."[30]

Individual teaching staff said they would mostly rely on referring students to student services because they would feel unprepared to get into issues of VAW/FM with a student. The line between academic support and more personal support may be more blurred for staff who work

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27 Ullman, S.E. (2010). *Talking about sexual assault: Society's response to survivors*. Washington, DC: American Psychological Association.

28 Davies, J.M., Lyon, E., & Monti-Catania, D. (1998). *Safety planning with battered women: Complex lives/difficult choices*. Thousand Oaks, CA: Sage.

29 http://www.fco.gov.uk/en/travel-and-living-abroad/when-things-go-wrong/forced-marriage/info-for-professionals

30 *Dealing with cases of forced marriage: Practice guidance for health professionals* (2007). Foreign & Commonwealth Office London, Home Office, National Health Service.

in positions in which they may become more involved with students' personal issues. This may include personal tutors who might benefit from specialised training on VAW/FM.

Several frontline staff said they did not feel adequately equipped to deal with VAW/FM and would welcome more specialised training, including more training on cultural sensitivity.

What staff want:

- More specialised training about VAW/FM for frontline staff
- Guidance for teaching staff on warning signs for VAW/FM and how to refer students promptly to student services and/or community-based specialist services
- Advice line/ live resource for staff
- More preventative work
- Training on how to deal sensitively with cultural issues
- Training and awareness sessions/days/events about VAW/FM

5.2.6 Ease of access to information about VAW/FM

Even if HEIs offer information about VAW/FM it may be buried on institutional websites and difficult to find. One interviewee said that the university had a lot of "standardised" online information for students and staff but when interviewee and RA searched the university's website for information specifically about VAW they could not find anything.

- One interviewee felt that student services would be supportive and able to refer on as needed, but might not be seen by students as the right place to go to. Efforts to raise awareness of available services would need to take this into account. Students may not be aware that their HEI has services or they may not perceive them as suited to their needs. Such barriers may not only be an issue for services offered by professional staff but also for services offered by students. For instance, one interviewee who was an officer in the local Student Union remarked that although they (the Student Union) were there to help, "the issue won't always come to us". Frontline services may need a higher profile including student services, personal tutors, and residential advisors.
- An HEI information strategy about VAW/FM should include multiple pieces of information such as:
  - Acknowledgement that VAW/FM are common problems affecting students (and staff), that HEI considers them unacceptable and takes an active approach to early intervention and prevention
  - Accurate and up-to-date resource information with phone numbers, email addresses or websites
    - Resources on campus (and whether they are confidential)
    - Resources in the community
  - Where the HEI's policies and protocols for addressing VAW/FM can be found (on the website, at which office)

6. Conclusions and outlook

We draw two central conclusions from this study: one about the significant presence of individual frontline staff and one about an equally significant absence of an institutional response in the sense of making the task of addressing VAW/FM a core organisational responsibility.

One, due to the expertise, motivation and commitment of individual frontline staff members, student support services can offer valuable assistance to students affected by VAW/FM. The value of individual staff members is enhanced further where they have developed good working relationships with each other so that they effectively work as teams and can draw on each other's expertise and experience. This is particularly valuable where staff members have acquired, often on their own initiative, specialist training on VAW/FM and where they have been in their posts long enough to also know a lot about local community-based services and thus can give their colleagues informed advice. Also of considerable value is the interest of individual frontline staff in having more information and specialised training about VAW/FM.

Two, due to a lack of a comprehensive organisational strategy against VAW/FM the availability of the frontline support that can be so helpful to students appears to depend primarily on the individual initiative of frontline staff and their line managers. This appears to work well in some cases but cannot be considered a comprehensive institutional response of the kind we outlined above and we which summarise again below. An institutional response to VAW/FM that is left to individual initiative will collapse as soon as the staff member leaves her or his post. Based on interviewee feedback we assume that the institutions mean well as far as issues of VAW/FM are concerned. However, meaning well is not the same as doing well. It may be the first step towards a

comprehensive organisational strategy but the next steps need to be taken, too.

Towards such a strategy, and in light of interviewee feedback as well as experiences with comprehensive institutional approaches elsewhere (and speaking as members of HEIs), we recommendthat post-secondary education institutions

1. Make our contribution to the prevention of VAW/FM one of our core responsibilities by developing a comprehensive organisational strategy that is integrated into and clearly visible in key institutional documents such as strategic plan, health & safety policies, and student conduct codes;
2. Participate in local multi-agency working with community-based specialist service providers, law enforcement and others, and develop more systematic referral practices;
3. Develop written policies and response protocols that give specific guidance on steps to take when students disclose VAW/FM; then train staff on these policies; and monitor policy implementation on a regular basis;
4. As guided by such policies, direct line managers to offer consistent support for front line staff dealing with cases of VAW/FM, including support for specialised training opportunities;
5. Encourage specialised training on VAW/FM through continued professional development, including sending staff to workshops or hosting workshops with specialist service providers from the local communities;
6. Develop and implement public awareness campaigns that offer accurate and easily accessibleinformation about resources for those affected by VAW/FM information throughout the institution (including campus-based and community-based resources) and that show students (and staff) that we are aware of the issues and are taking proactive steps to address them.

For post-secondary education institutions being proactive about sensitive issues such as VAW/FM may appear to be a risky proposition. The fear may be that an institution might expose itself to negative publicity. We argue that doing nothing and sticking the institutional head in the sand carries the greater risk of failing students. Moreover, the recent research on FM and on VAW students in the UK and abroad is contributing to an increasing global awareness that VAW/FM affects students and that institutions must act. Rather than being concerned about negative publicity and shying away from these issues this is a moment for educational institutions to be brave and lead.

Issues of VAW/FM in post-secondary educational contexts warrant more systematic research and policy development. Not only are VAW/FM serious problems but they disproportionately threaten the well-being and educational opportunities of some students, thus undermining efforts to widen access and enhance equality. More needs to be done to raise the visibility of VAW/FM at HEIs and FEIs and to develop the consciousness and capacity of these institutions to respond appropriately.

The Forced Marriage Unit has been undertaking a consultation on the criminalisation of forced marriage (ie creating a criminal offence of forcing someone to marry), as well as the criminalisation of breaches of the FMPO which are currently available under the 2007 Act. The consultation period ends at the end of March 2012. The outcome is likely to have further implications for how cases of FM will be treated (one likely outcome is that breaches of FMPO may be criminalised, in which case they would no longer be dealt with under civil rules, as they are at present, but under criminal rules.

All of this demonstrates the growing awareness of this issue as one which requires the involvement of all responsible agencies which must include HEIs as they are environments where FM may be disclosed, and where resources should be available to assist and support both students and the other agencies working in this area.

This pilot study has contributed to the evidence base onto which proactive institutional strategies may be built. However, the scope of this project was limited; we are only at the beginning of understanding the nexus of VAW/FM and post-secondary education. In order to enhance this understanding we plan to pursue further research in this area, expanding on the pilot and continuing it on a larger scale.

Table 1 Staff roles and scope of interview

Role of staff	*Focus of interview*
Staff in student services	*What issues have you seen relating to VAW/FM, relationship issues?* *How do students present these?* *What services are in place?* *How prepared do you feel to deal with these issues?* *What sort of training have you had to address these issues?* *What is the relationship between university and community services?* *How is information on cases kept, tracked, or statistics kept?* *How supported do you feel by university (including opportunities for professional development in this area)?* *Are there any other issues that come to your mind relating to this topic which we have not covered?* *What would further strengthen your responses to VAW/FM?*
Staff providing pastoral care	*What issues have you seen relating to VAW/FM, relationship issues?* *How do students present these?* *What services or supports do you offer?* *How do you work with other staff at university / in the community?* *What would further strengthen your responses to VAW/FM?*
Teaching staff	*What issues have you seen relating to VAW/FM among students?* *How prepared do you feel to address these with students?* *How aware are you of university or community resources?* *How has institution addressed issues?* *What would further strengthen your responses to VAW/FM?* *Management Have issues related to VAW come up in your daily work?* *How has the university responded?* *What has your role been in responding to these issues?* *How does university support front-line staff?* *Are there policies in place for dealing with these issues?* *How have they been developed and implemented?* *Is there opportunity for professional development in these areas?* *What would further strengthen your responses to VAW?*
Community-based service providers	*Are those approaching you students?* *Are there particular barriers or facilitating factors when supporting students?* *Do you have any working relationship with universities or colleges? Is there a referral system in place? How easy or difficult is it to find and access the righ contact points and people at university?* *What would further strengthen your responses to victims who are students?*
Police	*Have you had cases involving VAW among university students?* *What has been your experience working with universities on such cases? What would strengthen your work on VAW cases involving students?*

Table 2: Types of cases seen, training and perceived institutional response

No.	*Gender of interviewee*	*Frontline support*	*Number / type of cases seen that involved students*	*Do you have specialised training to address VAW or FM?*	*Does HEI have specific services for VAW/FM?*	*Does HEI have formal links to community services?*	*Does HEI have formal assessment of support with VAW/FM?*
1	F	Yes, HEI	8–12 cases of VAW per year (50% of case load) (no FM; but imam has dealt with "a number of occasions recently)	No	No	No	No
2	M	Yes, HEI	3 cases of VAW in past year (no FM)	No	No	No	No
3	F	Yes, HEI	12–15 cases of VAW per year (no FM)	No	No	No	General notes system
4	F	Yes, HEI	15 cases of VAW per year (no FM)	Yes (DV)	No	No	Not about VAW/FM
5	M	Yes, police	Many VAW cases but not recorded whether they involved students	Yes	N/A	N/A	N/A
6	M	Supervisor, HEI	6 cases of VAW per year (10% of case load); occasional cases of male victims of rape; 1 case of FM about every 3 years	No	No	No (and would be too complicated)	No (but assess feelings / mental health
7	F	Yes, specialist service	About 8 cases of VAW students per year (in recent years 4 cases per year) one case of FM several years ago where mature student presented with DV issues in a marriage she had been forced into)	Yes	N/A	No formal link to HEI, neither bilateral nor multi-agency	General exit questionnaire
8	M	Yes, police	Per year about 8 cases of girls where FM is issue; about 6 cases of FM out of 20–30 cases of HBV; 6 cases of violence involving students over past two years (not clear whether these 6 cases involved FM)	Yes	N/A	No specific experience working w/ HEIs	N/A

No.	*Gender of interviewee*	*Frontline support*	*Number / type of cases seen that involved students*	*Do you have specialised training to address VAW or FM?*	*Does HEI have specific services for VAW/FM?*	*Does HEI have formal links to community services?*	*Does HEI have formal assessment of support with VAW/FM?*
9	F	Yes, specialist service	3 cases last year of FM feared by students in further education; 1 case of FM feared by student in higher education (pressure on girls to drop out of college)	Yes	N/A	No experience working with HEIs	N/A
10	F	No, HEI	Not directly; rarely in context of reflecting on past experiences	Yes	Good general student services	Individual staff have excellent links	N/A
11	F	No, HEI	2 cases of VAW over course of career, one of these FM (flagged up through non-attendance and falling behind academically)	No	No	No specific knowledge re community services	N/A
12	M	Yes, HEI	1 case of past VAW every two years (students reflecting back), no FM 13 F No, HEI 4 cases of VAW per year (not FM)	No	Unaware	Unaware	Unaware
13	F	No, HEI	5 cases per year of female students being harassed	No	No data	HEI keeps database of specialist support agencies	General feedback form
14	M	No, HEI	At least 2 cases of VAW students per year	No	No, general student services	Unaware	None
15	M	Yes, police	2 cases of threat of FM over career;	Yes	N/A	Informal links with HEIs	N/A
16	F	Yes, HEI	2–3 cases of VAW students per year	Yes	Internal referral system	Makes regular referrals	Feedback

Waiting for Rights-Driven Evolution in Law Reform:
The Importance of Historical Development in Family Law

Frances Burton*

In a recent issue of *Jordan's Family Newswatch*[1] Duncan Ranton[2] drew topical attention to the role of time in evolution based reform in Family Law. He was in fact referring to the current debate on why the government of the day which sponsored the Civil Partnership Act 2004 had not "grasped the nettle" of gay marriage at that time instead of electing for the compromise of civil partnership, in respect of which it appears that, only eight years later, there is now a will to raise same sex partnership unions to full marriage. Ranton finds the explanation for this, and other significant reforms, in the necessity of awaiting the passage of time to reflect social change before introducing fundamental legislation. The concept is not new and was first addressed in Sir Henry Maine's classic text *Ancient Law*[3] in which he identified the universal existence of identifiable status in early societies, always *preceding* the introduction of formalisation to encapsulate the existing fact. In other words, social change always came first and law afterwards.

Of course such evolution is not always the case, for example where revolution makes dramatic change in a very short time[4], but upon examination this is usually also explained by a pent up social force demanding reform.

Examination of the way in which contemporary Family Law has developed in England and Wales supports Maine's classic theory and also Ranton's explanation that degrees of change are only reflected in legislation when the mood of society has sufficiently evolved to accept the changes in question.

Before the 20th Century

This is particularly true of child law.

In the 1800s, and earlier, children were treated, and even dressed, as "little adults": for an instant picture, one thinks of the famous painting of "Las Meninas", the Spanish painter Velasquez' portrait of the daughters of a 17th-century King of Spain, which Professor Stephen Cretney[5] used as the cover picture for one edition of his textbook Family Law .

Before the 19th century there was no significant child protection as such[6], not much divorce and what there was did not concern children, although successive 19th-century Acts gave the courts limited power to award custody of children to a divorced or separated mother (at first only of those under seven, but the age was gradually increased in successive decades). There was a preoccupation with parentage as this was important in connection with inheritance of property. Famous 19th-century cases included that of the Tichborne Claimant[7], where a lower class individual (subsequently shown to be Arthur Orton, the son of a Wapping butcher) claimed to be the lost son and heir of the Dorset landowner and baronet Sir Roger Tichborne, Bt; and persisted in this

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1 29 June 2012.

2 Solicitor, Russell, Jones & Walker.

3 1861, later republished by Oxford in 1906. Sir Henry James Sumner Maine, (1822-1888), Regius Professor of Civil Law in the University of Cambridge, and later, *inter alia*, first Professor of International and Comparative Law in the University of Oxford, was one of the forefathers of modern sociology of law and a leading figure of the English and German schools of historical jurisprudence.

4 For example in the French Revolution of 1789, in which provision for civil marriage was quickly enacted, this being one of the main demands of the revolutionaries who wanted secular marriage to escape what was seen as the baleful influence of the Church, whose abuses were early attacked, along with the monarchy which was similarly resented.

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6 What there was mainly addressed child labour as parents' authority was absolute, and that authority was the father's in relation to the child as an asset, like any other species of property.

7 See D Woodruff, *The Tichborne Claimant*, London, Hollis and Carter, 1957.

claim in a trial lasting seven years, which ended in his conviction for perjury and sentence to 14 years in jail. In those days there was no DNA or even blood testing to establish family relationships.

Establishing Parentage of Extra Marital Children

Parentage as such was mostly about rights over children rather than obligations to them, and was closely connected to finding someone responsible for their maintenance so that that did not fall upon the local parish in which the child was found if no such person was legally responsible for the child.

Sometimes parentage was the subject of litigation under the Bastardy Laws Amendment Act 1872, s 4 which enabled a single woman to take out a summons against a man whom she alleged to be the father of her child, so as to provide for the child's education and maintenance. The term "a single woman" also included a married woman who had lost the common law right to be maintained by her husband (for example by committing adultery or deserting him) although initially she could only get five shillings a week (now 25 pence in today's pounds sterling, perhaps £15 in equivalent 21st-century values). However, although she only had to prove paternity "on a balance of probabilities" instead of the stricter criminal standard of "beyond reasonable doubt", her evidence had to be "corroborated in some material particular by other evidence … to the satisfaction of the justices". The corroboration requirement was said in the judgments of two early 20th-century cases to "prevent men being at the mercy of profligate women"[8] or to provide at least some protection for them from "wicked or unfounded charges which might so easily be made if the evidence of the woman without corroborative evidence was sufficient"[9]. The five shillings maximum remained in place for some time after 1872. Although it was put up periodically this was only by small amounts until the Maintenance Orders Act 1968 removed the statutory restriction on the maximum that could be awarded. This followed a *Departmental Report of the Committee on Statutory Maintenance Limits*[10], an inquiry chaired by the female Metropolitan Stipendiary Magistrate, Jean Graham Hall - still a long way from the modern Child Support Acts and comparatively simple DNA testing which is now so routinely employed that any member of the public can find out about the practical aspects of such testing on the website of the contemporary Child Support Agency, which administers child support regardless of the marital status of their parents. This system which we now take for granted only eventually replaced the 1872 Act and the subsequent Affiliation Order Acts when they were finally abolished by a combination of the legislation as late as the 1980s and early 1990s, when the Family Law Reform Act 1987, the Children Act 1989 and the Child Support Act 1991 ultimately embodied the modern approach to the status of children and child support.

Like so many developments in Family Law these changes had to wait for over a hundred years until Family Law reform gathered momentum well after the end of World War II permitted examination of social change and the consequent legislative recognition of the need for legislative reform.

Cuckoos in the Marital Nest

Despite the opportunity to examine child maintenance which was afforded by the greater affluence of the 1950s and 60s, there was, however, a continuing reluctance to bastardise a married woman's child so that, even where there was a suspicion or even near certainty that the husband was not the father, the judge had to be satisfied beyond reasonable doubt of any other alleged paternity. This was, first, because there was a strong common law presumption that the husband was the father of any child born or conceived in wedlock, thus in that case the higher standard of proof was required to displace the presumption. Secondly, the husband had to establish that he could not possibly be the father, and although this would be presumed if the spouses were separated by order of the court, it was not the same if they were only separated by agreement unless he was "beyond the four seas"[11] i.e. abroad.

While we now take for granted that it is in any child's interest to know its true parentage because of the recognition of the psychological importance of origins to identity, it was therefore particularly difficult for many years to prove that the husband could *not* be the father because there was also a rule that it was not in the interests of public decency to allow either party to give

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8 Per Lord Justice Phillimore in *Mash v Darley* [1914] 3KB 1226, 1235.

9 Per Lord Reading, CJ, in *Thomas v Jones* [1920] 2 KB 399, 405.

10 1968, Cmnd 3587, p88.

11 See per Sir John Leach V-C in *Head v Head* (1823) 1 Sim and St 151.

evidence as to whether either had or had not had intercourse at the relevant time. This subsisted until statutory abolition by the Law Reform (Miscellaneous Provisions) Act 1949, although in the meantime there had been a crucial breakthrough in the development of blood grouping by the Austrian scientist Karl Landsteiner (1868-1943) which, although discovered in 1900, was first used by the courts in 1942 in a nullity case called *Wilson v Wilson* otherwise *Jennings* [12] where a decree was granted on the undisputed evidence that the husband could not possibly be the father of the child.

Thus followed the Family Law Reform Act 1969, adopting the philosophy that it is generally in the child's interests to know its genetic origins, enabling blood testing to be directed and where this was refused by the parties involved (because their autonomy in such consent was preserved by the statute), permitting the court to draw such inferences as were appropriate unless there were very clear and cogent reasons for the refusal to be tested. Today such tests are often *demanded*, rather than avoided, by putative fathers, the results cheerfully publicised and society far from shocked by the revelations, since it has long been recognised that there are no genuinely "illegitimate children", only illegitimate parents. There are, indeed, a number of known cases where the child in question, even when adult, has initiated testing in order to settle his or her parentage accurately, and also where it is common knowledge that the legal identity of some well known personalities does not match the fact of their acknowledged actual parentage.

This too was a development of the watershed of the later 1960s and 1970s, and probably owes its origins to the reforms of divorce law in 1969.

Legitimation

It did, however, take some time for society to address the legal status of a child's parentage. This probably is because of the importance in English law of the concept of "the heir" in property law, which developed traditional concepts which were at first hard to displace.

Historically, English common law did not admit legitimation by subsequent marriage, although civil law and canon law did. Even in the Middle Ages the Barons, following their debate when assembled at Merton in 1236, said "with one voice" that they "would not change the laws of the realm which hitherto had been used and obeyed" and would not allow the common law to be changed. Illegitimate children suffered a hard fate in medieval times since they could not only not be recognised as legitimate even if their parents married subsequently but were barred from entry to the Church which formed a large part of medieval society and employment, and this continued despite the fact that there were many famous illegitimate births even amongst the nobility and even the royal families: the most famous being William, Duke of Normandy, known to English history as William the Conqueror (but more rudely in some medieval chronicles as "William the Bastard, Duke of Normandy", to which Saxon chroniclers would sometimes add "called King of England"!). Many kings had natural sons and daughters, and many succession problems could have been solved[13] if these able natural children could have replaced their often weaker half siblings.

As a result, it took an Act of Parliament of Richard II to legitimise the four children of John of Gaunt, Duke of Lancaster, and his third wife Katherine Swynford, from whom all English monarchs subsequent to the death of Henry III in 1272 are descended, and to whom the Duke gave the surname Beaufort after one of his continental possessions so as not to allow any impact of their existence upon the significant English inheritance of his legitimate children. It was not until the Legitimacy Act 1926 that children born out of wedlock were legitimated by their parents' subsequent marriage, although this Act still excluded those children who were born as a result of their parents' adultery i.e. when one or both were married to another person at the time of the child's birth. Thus this Act would not have helped the Beaufort children all of whom were born while the Duke was married to the second of his prior wives although after the death of the subsequent Duchess' first husband, a knight in the service of the Duke.

So, given the strength of the principle that illegitimacy at birth could not be undone, how did the change of heart in respect of subsequent marriage in the case of births from adulterous unions come about?

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[12] (1942) LJ 129, 226.

[13] Such as on the death without a legitimate male heir of William the Conqueror's most able son, Henry I, in 1135, which led to civil war between his daughter, Matilda, and nephew, Stephen of Blois (who with the support of the Barons succeeded to the throne as King Stephen) while the King's illegitimate son, Robert of Gloucester, who had many of his father's talents, would have made a fine King, but instead could only support his half sister in her claim to be recognised as Queen in accordance with the Barons' oaths to their father that her right to the succession was fully acknowledged in his lifetime.

Following World War II, and a large increase in adulterous illegitimacies , a further Legitimacy Act 1959 reached the statute book, removing the restriction on legitimation by subsequent marriage in the case of "the children born of an adulterous union" but this was only after much moral debate and opposition: and it was not until the Family Law Reform Act 1987 that the concept of illegitimacy as such was in practice abolished altogether as far as the child was concerned although the legislators drew back from complete assimilation of the positions of children born in wedlock and those outside it for other practical reasons .

In the meantime, until the passage of the 1959 Act, those parents of "adulterine children" had been obliged to fall back on adopting them when they had wanted to legitimate them by subsequent marriage.

However there remained one problem, not the first where reform of one area of Family Law simply created another, new, conceptual one. it was decided that despite, or perhaps because of, the increased centralisation of the child and its welfare in Family Law, illegitimacy should be abolished altogether in so far as it discriminated against the child, but the distinction between births to married parents and those outside wedlock should be retained for some purposes. This was because policy dictated that the unmarried father should not automatically have the parental authority which a father did not necessarily deserve if he had, for example, raped the mother, or the birth had been the result of a casual association, and it had not been determined whether ongoing parental authority was in the child's interests.

This position has since been updated in the Adoption and Children Act 2002 (where if the father registers the birth with the mother he has the parental responsibility created by the Children Act 1989) and amendments to the 1989 Act have provided that it can be obtained by agreement in due form, by order of the court or by the grant of a residence order under the 1989 Act.

Parental powers and authority over children

Inevitably, with the recognition of the growing status of children as not mere chattels of its parents, or more accurately of the father, the wheel of time and fortune has moved on through the concept of parental authority: this has been a major change, from the absolute power of the father of the late 19th century to the contemporary situation in which Child Law centres round the child and Family Law is no longer necessarily driven by the parents' relationship in which the children are mere appendages. The watershed for this was the change in status of the father as head of the family, with power and authority over his family unit.

This was, as Cretney mentions[14], "clear and simple" at the beginning of the 20th century: it was the father who was entitled to decide everything in the life of a legitimate child and the child's mother had no right either to what was then called "custody" or "care and control" (now it would be a "residence order"). He also decided where the child should be educated and what religion s/he should follow.

In the 1920s, when the first women obtained the right to vote, the National Union of Societies for Equal Citizenship campaigned for legal equality for women and men. Married women were clearly disadvantaged as a single woman had sole legal authority over her child as established in *Barnado v McHugh*[15] in 1891. However, some change crept in - a divorced woman might also have the same legal authority over her child by court order: this was highlighted by Mrs Margaret Winteringham MP in the 1924 Parliamentary debates on the issue of reforms in this respect, in which the contemporary Parliamentary report records the future Lord Chancellor, Lord Simon, expressing surprise that his father (a Nonconformist minister) would have been "greatly astonished" to hear that the law was that he alone could decide whether his child could go on a routine outing to watch the local cricket match or equally whether he should be operated on in the newly fashionable – but dangerous – procedure of tonsillectomy[16]. Moreover the father could appoint a testamentary guardian of the child and on the father's death the guardian would step into the father's shoes and the mother could not interfere in his decisions: *Wellesley v Wellesley*[17].

However no legislation appeared until 1925, despite pledges by the Conservative and Liberal leaders of the post–War coalition, when the Guardianship of Infants Act 1925 was passed, importing into the preamble only some

14 S Cretney, *Family Law in the Twentieth Century*, Oxford, OUP, 2003, 564

15 [1891] AC 388.

16 *Official Report* (HC) 4 April 1924, vol.171, col 2968.

17 (1828) 2Bl (NS) 124, 145-146.

of the principles of equality between the sexes, as set out in the Sex Disqualification (Removal) Act 1919, but the Act still maintained the position of married women, except in so far as a procedure was created by s 2 for the mother (as well as the father) to make an application to the courts in respect of any matter affecting the child (including to the magistrates courts so that the working classes were not excluded).

This was the Act that also created in s 1 the now familiar mantra that in reaching decisions about the child's custody or upbringing or the administration of any property belonging to, or held in trust for him, the court was to regard the child's welfare as the first and paramount consideration: it also provided that the court should not take into consideration whether from any point of view the claim of the father was superior to that of the mother – or the claim of the mother superior to that of the father, and gave the mother as well as the father the right to appoint a testamentary guardian.

However, the Act still did not give parents equal authority which was not accorded to the mother until as late as the Guardianship Act 1973. This was another provision which can be traced directly to the reforms of the late 1960s following the reform of divorce law, which itself followed the changes in society which could instantly be observed by the end of Word War II when women, in the absence of their men, had assumed much greater responsibilities than ever before in taking a greater part in the war effort than previously in any walk of life.

There had been similar, but weaker, indications of change following World War I, such as when in 1919 women were admitted to the legal profession: but the 1925 denial was still based on the belief that "from a purely administrative point of view" it was essential that there should be an easily identifiable person in the family who could take decisions, since the Lord Chancellor was advised by his civil servants that equal authority legislation was "nonsense" because if both parents had equal rights there would be a deadlock whenever there was a difference of opinion between them! The second objection was that, in the case of the feared deadlock, there would be no alternative to referring parental disputes to the courts, and that this would be unacceptable, first, because the interference of the court into family life would be undesirable, creating discord never fully eradicable and therefore unacceptable, and, secondly, that the issues involved were not really justiciable, because the court could be concerned with rights but that the issues concerned were matters of discretion[19].

Sir Claud Schuster, Permanent Secretary in the Lord Chancellor's office, was recorded as saying "There are no rights here. It is a question of discretion. To take a ridiculous example, a dispute whether a child is to go to one school, or to another school – how on earth is the court going to deal with that?" - a view a long way from the routine of today's Family judiciary, who daily deal with s 8 orders under the Children Act 1989 on precisely such topics which generate specific issue or prohibited steps order applications, as they do in the other example given in a memorandum of the time[19] where the Minister of Health expresses his concern about parental disputes over consent to vaccination (then, as since, a fertile field of differing opinion).

It is however interesting that the minutes of these pre 1925 Act meetings also disclose another concern which has a contemporary relevance, namely the practical question of the additional resources necessary if the Court were to be "imported into every family difference in every household in which perhaps some temporary contest of will or misunderstanding may arise". This certainly chimes with the recent new Family Procedure Rules 2010 rule 3.1 and Practice Direction 3A which sets out a protocol for assessment of the parties for mediation before family proceedings are begun (although urgent children applications are excluded from the requirement).

The 1973 Act in fact had far reaching effects. Prior to it a mother could not consent to a child's marriage, nor authorise withdrawals from the child's Post Office Savings Account, or apply for a passport for the child: nor could she consent to surgery, all restrictions unthinkable today. However with these freedoms came greater restrictions, as often was to happen in the rapid development of Family Law to match the changes in society, since as Family Law became more complex the issue then immediately arose of the place of state intervention versus the autonomy of the family, the former quickly becoming explicitly justified in the cause of progress.

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18 *Joint Select Committee on the Guardianship of Infants Bill*, Minutes of Evidence 25 July 1922.

19 16 February 1922 Minister of Health to the Home Affairs Committee, PRO LC02/572.

State Intervention

The 1970s were a fertile ground for further developments in public and private child law occasioned by the increase in divorce following the Divorce Reform Act 1969 and the accompanying Matrimonial Proceedings and Property Act 1970, which were consolidated in the Matrimonial Causes Act 1973. These reforms occasioned a need to make orders in respect of children's post divorce custody, care and control. While previously there had been a general reluctance to allow state intervention in the family when parents split up, when the family was no longer a unit orders were clearly necessary. Contrary to the position under the Act now – where the influence of the philosophy of the Children Act 1989 dictates that, because of the concept of shared parenting there should be a strict no order principle applicable unless an order is really necessary – the court was obliged to decide who should have custody and care and control, either as a unified package or in appropriately divided segments, together with access to the child for the parent without care and control.

This order for custody had been the usual outcome since the Matrimonial Causes Act 1857 and was made as the court deemed "just and proper". At that time women who committed adultery never received either custody or even access to their children since Victorian judges thought this was good for the support of morality on which it would have "a salutary effect … that it should be known that a woman, if found guilty of adultery will forfeit … all right to the custody or access to her children"[20]. It was not until after World War II that it was realised that the fact that a woman had committed adultery was not necessarily inconsistent with her being a good parent; and following some 1948 decisions this idea not only grew but was specifically related to the provisions of s 1 of the Guardianship of Minors Act 1925 which declared the child's welfare to be "first and paramount". However the practical implementation was much longer in coming about and it was common in the 1960s and 1970s for women to settle cases with their husbands on the basis that he would not contest care and control if he were allowed ample access; and these agreements were frequent because of the necessity at that time to make some orders in respect of the children before a certificate could be effected by the court that the divorce decree nisi could be granted. All this changed when the Children Act 1989 was passed bringing with it the no order principle.

The Children Act also brought with it codification of the public law in relation to children, creating a new comprehensive scheme for state intervention to protect children within the family after such relationships broke down, both during the marriage of their parents and within any non-marital arrangement.

Of course there had been previous protection of children but in the 19th century these had focussed on child labour and factory legislation, and abuses of children in such contexts as recorded in the novels of Charles Dickens e.g. *Oliver Twist* and Charles Kingsley e.g. *The Water Babies*, and also George Crabbe's *Peter Grimes*, more recently a 20th-century opera of Benjamin Britten.

There was also a 19th-century philanthropic movement to provide schools and education for poor children and homes such as set up by Dr Thomas Barnado, although the mercenary instincts of parents were evident in their exploitation of his homes by their sending children there in their early years but then wanting them back so that they could earn a wage!

It was a while before it seems to have been realised that children needed protection from their parents as much as from their employers. In 1891 there was a Custody of Children Act which enabled the court to refuse to enforce a parent's right to custody by habeas corpus if the parent had abandoned or deserted the child, but no attention was given to the dichotomy between the parent's right to care for the child and the child's right to be protected from harm. The Infant Life Preservation Acts 1872 and 1897 tackled another abuse, the baby farmers who took in babies and very small children for fees and then starved and neglected them so that they often quickly died. In 1889 and 1890 the London Society for the Protection of Children became a national society and came under Royal Patronage, leading to the Prevention of Cruelty to and Protection of Children Act 1889, which created in s 3 an offence of ill treating, neglecting or abandoning a child in a manner likely to cause the child unnecessary suffering.

The Act also permitted the child to be taken, under s 6, to a place of safety foreshadowing later enactments, and gave the court the power to investigate what went on in the former privacy of the home, going well beyond the former Poor Law Acts, such as the Poor Law Amendment Act 1868, which had been little used. Nevertheless, as identified in the 1983 case of *Leeds City Council v West Yorkshire Metropolitan Police*[21] the Poor Law was "the historic base from which Parliament

[20] Per Sir Cresswell Cresswell in *Seddon v Seddon* (1862) 2 Sw & Tr 640, 642.

[21] 1983] 1 AC 29.

advanced to meet the needs of the orphan, the deserted and the abandoned child".

The Poor Law had in fact had its origins as long before as 1601, envisaging at that time that the unemployed poor should be "set to work" and children apprenticed, but there was much amendment of this in the 19th century, followed by an emigration project in the early 20th for sending children to the Colonies, particularly Canada.

Towards the Children Act 1989

The late nineteenth century also developed the forerunners of the modern foster care system and the first Children Act was passed in 1908 which was meant to consolidate all these initiatives, to set up a juvenile court and to create criminal sanctions to protect children's welfare. These included for any child under 7 being left alone in a room with an open fire grate not sufficiently protected against the child being burned or scalded". The Act also prohibited allowing a child under 16 to beg or one between 4 and 16 to "reside in or frequent a brothel" or consort with a common or reputed prostitute, although by s 58 this was condoned if the mother was herself a prostitute and was "exercising proper guardianship and care to prevent the child being contaminated" !

The 1908 Act was supposed to be a "Children's Charter" and it did also set about the task of "the rescue as well as punishment" of young offenders. Incidentally, the wife who had no rights of parental authority over her children could be prosecuted for neglect under this Act and/or for failing to see that the children went to school.

The Act significantly extended the court's powers to take action in respect of abandoned, neglected or abused children and to take them away from unsatisfactory parents i.e. those of "criminal or drunken habits". Such children could then either be sent to an industrial school, an institution only slightly better than a reformatory school, although both were designed to provide training and weaning of children who had come under the court's powers pursuant to the Act from their bad habits learned in the care of their ineffective parents. The Act also gave the State powers to search for and remove children and to investigate their circumstances, and to commit them to a relative "or some other fit person" – early forerunners of the Children Act 1989 which largely remained in place until that Act, although there was further reform under the Children and Young Persons Act 1933.

Meanwhile in 1926 the Adoption of Children Act, following public pressure, created for the first time in English Law a procedure for formal recognition of the assumption of the legal responsibilities of parenthood which had previously been only an informal status often recorded in Victorian literature, such as in Anthony Trollope's novel Dr Thorne, and which continued throughout the beginning of the 20th century and World War I. This new 1926 regime was originally hardly regulated at all but was then developed into State controlled system under the Adoption of Children (Regulation) Act 1939 and a further Act in 1949, as it was recognised that this could provide the "fresh start" that some abandoned or neglected children clearly required. This scheme finally becoming a recognised local authority social service consolidated in the Adoption Act 1976, now the subject of further modernisation in the Adoption and Children Act 2002, and currently in the development of new regulations to speed up adoption and allow more matches between children and prospective adopters to come to fruition.

Child Protection in the Welfare State

It was, however, only after World War II that the government began to action the growing interest of the public which they had recorded in 1938 in the "less fortunate children in the community". While one committee considered the 1943 Beveridge Report on the proposed abolition of the Poor Law, which had still continued alongside all the 19th and early 20th century legislation, the 1946 Report of the Curtis Committee of Inquiry led to a Children Act 1948 which laid the foundations of State provision for children in need. As Cretney says in his *History of Family Law in the Twentieth Century*[22] it was that Act that "can properly be regarded as an integral and important part of machinery of the post WWII Welfare State". It was not perfect, and it was eventually overtaken by much more detailed provision when reform of Child Law followed the Divorce Reform of the 1970s, but in this 1948 Act can be detected the origins of the later Children Act 1989 provision, and the

[22] Oxford, OUP, 2003, 672.

later refining amendments to that Act as modern conditions show that we still have not solved all the problems.

To the 1948 Act can be traced the responsibility of the local authority to provide for children in need; the requirement to further their best interests and to offer opportunities for the development of the child's character and abilities; and the furtherance of the aspiration that children's care should be in the hands of an identified human being, leading to the appointment by each authority of a qualified children's officer.

It was not until the Children and Young Person's Act 1969 that the "care order" was created to facilitate these policies by giving the local authority parental authority where required. This was closely followed by the Social Services Act 1970 which was designed to achieve the reorganisation of local authority social services, bringing about a greater professionalization of social services but inaugurating a period of apparent disorder, as there were successive child abuse scandals and inquiries into alleged failures by those responsible for preventing them. Unfortunately these were certainly not eradicated by the passage two decades later of the Children Act 1989 which Cretney has described as "unquestionably" providing "a far better framework for the administration of the law than anything that had gone before". However he still queries both whether the courts can really determine what is for the welfare of the child and how, in the contemporary volume of work to be processed, the court system can do so without breaching the principle that delay is prejudicial to the child.

Conclusion

Accordingly, when this timeline is examined, and it is seen how the evolution of ideas and replacement of long held concepts has come about when they have been periodically amended to reflect contemporary society, it does not appear unduly strange that in 2004 the then government did not feel ready to sponsor same sex marriage instead of supporting the more limited Civil Partnership Act at that time. Whether the present government is now right to go ahead with their equality goal so as to bring forward marriage for same sex partners is another matter, as the current heated debate shows. But that is another story. What is evident, however, is that evolution rather than revolution has attended prior reforms over time which are now taken for granted, and that this remains in accordance with the Maine theory of how formalising social practice with legislation has developed from earliest societies. Thus whether the present civil partnership provision was insufficient in 2004 is not really relevant in 2012 if it is now felt that the time has come for further reform. What is relevant is whether that time has now come.

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The journal follows the widely used academic format whereby the author's name should appear in the heading after the article title with an asterisk. The author's position and affiliation should then appear next to the asterisk at the first footnote at the bottom of the first page of the text. Email address(es) for receipt of proofs should be given separately in the body of the email to which the submitted article is an attachment. Please do not send this information separately.

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House style guide

The house style adopted for *Family Law and Practice* substantially follows that with which academic and many practitioner authors writing for a core range of journals will be familiar. For this reason *Family Law and Practice* has adopted the most widely used conventions.

Tables/diagrams and similar

These are discouraged but if used should be provided electronically in a separate file from the text of the article submitted and it should be clearly indicated in the covering email where in the article such an item should appear.

Headings

Other than the main title of the article, only headings which do substantially add to clarity of the text should be used, and their relative importance should be clearly indicated. Not more than three levels of headings should normally be used, employing larger and smaller size fonts and italics in that order.

Quotations

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

All quotations should be cited exactly as in the original and should not be converted to *Family Law and Practice* house style. The source of the quotation should be given in a footnote, which should include a page reference where appropriate, alternatively the full library reference should be included.

Cross-references (including in footnotes)

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

Cross-referencing should be kept to a minimum, and should be included as follows in the footnotes:

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

Full case citations on each occasion, rather than cross-reference to an earlier footnote, are preferred. Please do not use End Notes (which impede reading and will have to be converted to footnotes by the typesetter) but footnotes only.

Latin phrases and other non-English expressions

These should always be italicised unless they are so common that they have become wholly absorbed into everyday language, such as bona fide, i.e., c.f., ibid, et seq, op cit, etc.

Abbreviations

If abbreviations are used they must be consistent. Long titles should be cited in full initially, followed by the abbreviation in brackets and double quotation marks, following which the abbreviation can then be used throughout.

Full points should not be used in abbreviations. Abbreviations should always be used for certain well known entities e.g. UK, USA, UN. Abbreviations which may not be familiar to overseas readers e.g. 'PRFD' for Principal Registry of the Family Division of the High Court of Justice, should be written out in full at first mention.

Use of capital letters

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

Even well known Conventions should be given the full title when first mentioned, e.g. the European Convention for the Protection of Human Rights and Fundamental Freedoms 1950 may then be abbreviated to the European Convention. The United Nations Convention on the Rights of the Child should be referred to in full when first mentioned and may be abbreviated to UNCRC thereafter.

Spellings

Words using 's' spellings should be used in preference to the 'z' versions.

Full points

Full points should not be used in abbreviations.

Dates

These should follow the usual legal publishers' format:

1 May 2010
2010–2011 (not 2010-11)

Page references

These should be cited in full:

pp 100–102 (not pp 100–2)

Numbers

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

Cases

The full case names without abbreviation should be italicised and given in the text the first time the case is mentioned; its citation should be given as a footnote. Full neutral citation, where available, should be given in the text the first time the case is cited along with the case name. Thereafter a well known abbreviation such as the Petitioner's or Appellant's surname is acceptable e.g. *Livesey (formerly Jenkins) v Jenkins* [1985] AC 424 should be cited in full when first mentioned but may then be referred to as *Livesey* or *Livesey v Jenkins*. Where reference is to a particular page, the reference should be followed by a comma and 'at p 426'.

For English cases the citation should follow the hierarchy of reports accepted in court (in order of preference):

– The official law reports (AC, Ch, Fam, QBD); WLR; FLR; All ER
– For ECHR cases the citation should be (in order of preference) EHRR, FLR, other.
– Judgments of the Court of Justice of the European Communities should be cited by reference to the European Court Reports (ECR)

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

Titles of judges

English judges should be referred to as eg Bodey J (not 'Bodey', still less 'Justice Bodey' though Mr Justice Bodey is permissible), Ward,LJ, Wall, P; Supreme Court Justices should be given their full titles throughout, e.g. Baroness Hale of Richmond, though Baroness Hale is permissible on a second or subsequent reference, and in connection with Supreme Court judgments Lady Hale is used when other members of that court are referred to as Lord Phillips, Lord Clarke etc. Judges in other jurisdictions must be given their correct titles for that jurisdiction.

Legislation

References should be set out in full in the text:

Schedule 1 to the Children Act 1989

rule 4.1 of the Family Proceedings Rules 1991

Article 8 of the European Convention for the Protection of Human Rights1950 (European Convention)

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

Children Act 1989, Sch 1

Family Proceedings Rules 1991 (SI 1991/1247), r 4.1 (SI number to given in first reference)

Art 8 of the European Convention

'Act' and 'Bill' should always have initial capitals.

Command papers

The full title should be italicised and cited, as follows:

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

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

Journals

Article titles, like the titles of contributors to edited books, should be in single quotation marks and not italicised. Common abbreviations of journals should be used
whenever possible, e.g.

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

However where the full name of a journal is used it should always be italicised.