

Father's rights and family law

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Introduction

I'm going to focus on a network that has become one of the key players in family law debates and policy: the fathers' rights movement.

I will give an outline of the fathers' rights movement, and assess the claims it makes in advancing its agendas in family law.

Overview of the fathers' rights movement

The fathers' rights movement is defined by the claim that fathers are deprived of their 'rights' and subjected to systematic discrimination as men and fathers, in a system biased towards women and dominated by feminists (Flood 2004). Fathers' rights groups represent an organised backlash to feminism. Their worldview is captured in an open letter to Prime Minister Howard from the Fatherhood Foundation: 'For too long Aussie dads have been libeled by the media, vilified by feminists, and denied justice by our court system.'

Fathers' rights groups in Australia include the Lone Fathers Association, the Men's Rights Agency, the Shared Parenting Council, Dads Against Discrimination, and many others. There is an overlap between fathers' rights groups, men's rights groups, and non-custodial parents' groups where members are often fathers. Fathers' rights and men's rights groups can be seen as the anti-feminist wing of the men's movement, the network of men's groups mobilised on gender issues (Flood, 1998).

The fathers' rights movement is a response to profound shifts in gender and family relations over the past four decades. Above all, it is a response to painful experiences of divorce and separation, as well as experiences of family law. Fathers' rights groups are characterised by anger and blame directed at ex-partners and the 'system', and such themes are relatively common among separated men. Significant proportions of men feel angry at their ex-wives, this anger lasts for years, and blaming of their ex-partners intensifies over time (Jordan, 1998, pp. 22-23).

A related source of entry into fathers' rights groups is separated men's dissatisfaction with loss of contact with their children. Most children's living arrangements are established at the point of parental separation, finalised without the need for a Family Court order and do not change afterwards (Smyth et al., 2001). At the same time, many non-resident fathers would like to see more contact occurring (AIFS, 2003, p. 8).

The fathers' rights movement is a response also to shifts in gender roles and in the structure and meaning of family and parenting relations. The image of the nurturant father, highly involved with his children and sharing the parenting with his female partner, now exerts a powerful influence on popular perceptions. However, the culture of fatherhood has changed much faster than the conduct. There has been virtually no change in the gender division of child care in couple households over 1986 to 1997 (Baxter, 2002, pp. 409-410). Nevertheless, many men aspire to do more fathering than they actually perform (Russell et al., pp. 4-8).

The state of contemporary fatherhood is 'both better than ever and worse than ever' (Doherty, 1997, p. 218). On the one hand, fatherhood is enjoying the best of times among families with positive parental relationships and stable, committed father-child bonds and among post-divorce

families with residential fathers or positive involvement by non-residential fathers. On the other, 'more children do not live with their fathers, relate to their fathers on a regular basis, or enjoy the economic support of their fathers' (Doherty, p. 221).

Large numbers of non-resident fathers do not provide adequate economic support for their children after a divorce (Wolffs & Shallcross, 2000, p. 29). Most pay little child support or none at all, but this is because they are poor. Most non-resident fathers are 'dead broke', not 'dead beat'. At the same time, resident mothers are even poorer (Silvey & Birrell, 2004).

Key claims and critique

I will now provide a critique of several of the key claims and policy proposals made by fathers' rights groups. I should note that I have written more detailed versions of these assessments elsewhere, and I can provide them to anyone who wishes.

Re. 50:50 shared parenting

A long-standing goal of fathers' rights groups is a rebuttable presumption of joint custody following family breakdown. This would mean that children would be required to reside with both separated parents for equal periods, unless there were good reasons to do otherwise.

There are at least five problems with the proposed rebuttable presumption of joint residence (Flood 2003, pp. 41-47).

First, such a presumption of joint residence is unnecessary: there are no formal obstacles to parents sharing the care of children after separation and divorce. Family law already endorses the principle of shared parenting. Separating parents can make arrangements for shared residence, and small numbers do.

Second, the parents to whom this legal change would apply are those least able to set up shared parenting. The small minority of separating parents who reach the courtroom are often experiencing the most intractable and bitter conflicts, face issues of violence and abuse, and are the least likely to be in a position to share residence and parenting of their children.

Third, one size does not fit all. The best interests of the child would be compromised by *any* presumption of a specific type of residence arrangement. The proposed law would undermine the ability and flexibility families need in order to develop parenting arrangements which best fit their children.

Fourth, the introduction of a presumption of joint residence is likely to increase the use of litigation to rebut the presumption, stretching the resources of the Courts and government.

Finally, a legal presumption of joint residence is likely to expose women, children and men to higher levels of violence. This prospect is particularly troubling given that there are already cases where the practice of family law privileges parental contact with children over children's safety.

Promoting fathers' positive involvement with children is a laudable goal. But it will not be achieved by ill-considered changes in family law.

Two broader arguments underpin the call for a presumption of joint residence. The first concerns fatherlessness.

Fatherlessness and father absence

Fathers' absence from families is said to cause a wide range of social problems, from crime to poor school achievement. Certainly, children raised in two-parent families do better on measures

of educational achievement and psychological adjustment than children raised in single-parent families. But the research also shows that neither fatherlessness nor divorce by themselves determine children's well-being (Flood 2003, pp. 23-26).

One of the most significant influences on children's well-being is the quality of parenting and family relationships. Conflictual and unhappy relationships are damaging to children, in both 'intact' marriages and between separated parents. In situations where children do not live with their fathers, contact with fathers is not by itself a good predictor of their well-being. Instead, the most consistent predictor is fathers' 'authoritative' parenting – that is, parental encouragement and support and non-coercive rule-setting and monitoring.

Negative outcomes among children who grow up without their fathers or after divorce are explained in part by selection effects. Some families are characterised by parental conflict, drug abuse, mental illness or violence. Couples in these circumstances are more likely to divorce, *and* their children are more likely to show behaviour problems, both before and after divorce.

The association between father absence and poor outcomes among children also is shaped by the changes which accompany separation, particularly economic insecurity and loss of access to social networks and communities. Poverty is both a cause and an effect of single parenthood, and economic hardship is associated with negative outcomes among children. While children experience their parents' separation and divorce as traumatic, three-quarters of children show no resulting negative effects or long-term problems in adjustment.

Fathers' presence has diverse effects on children, and in some cases these are negative. When fathers are violent, drug-abusing, or irresponsible, and reside with their children, their children suffer. Fathers dealing with such issues must be supported, but not at the expense of children or mothers.

Public claims that fatherlessness causes a host of social problems have sometimes been based on a confusion of correlation and causation, the selective use of research evidence, and even the repetition of fictional statistics.

Male role models

A second common argument is that children, and boys in particular, require male role models in the form of a biological father to ensure their healthy development (Flood 2003, pp. 26-30).

There is no doubt that boys, and girls, benefit from the presence in their lives of positive and involved fathers. However, positive and nurturant parenting by mothers *or* fathers (and ideally both) makes more difference to children's outcomes than the simple presence of a father *per se*. In terms of boys learning 'how to be men' from their fathers, the research finds that fathers' masculinity and other individual characteristics are far less important than the warmth and closeness of their relationships with their sons. The characteristics of fathers as parents, rather than their characteristics as men, influence children's development.

Boys (and girls) raised only by women, whether single mothers or lesbian couples, are no more likely than other children to adopt an unconventional gender identity or homosexual sexual orientation.

Fathers' involvement in families *is* highly desirable. Involved fathers expand the practical, emotional and social resources available for parenting. With two parents rather than one, children are likely to receive more emotional support, supervision, and to have greater access to wider networks and material resources. Fathers' involvement is also important because of the distinctive, but not unique, contribution to parenting made by male parents.

Regarding violence

Fathers' rights groups make a series of further claims, regarding domestic violence and child abuse. I'll briefly run through these, although again, I can send more detailed accounts to those who want them.

Myth: False allegations of DV and the misuse of protection orders

Fathers' rights advocates claim that women routinely make up allegations of domestic violence to gain advantage in family law cases, and they misuse protection orders to remove men from their homes or deny contact with children.

There is no doubt that family court proceedings often are accompanied by allegations of domestic violence and the use of protection orders. However, this reflects the fact that domestic violence often escalates at the time of separation.

From Australian evidence, women living with domestic violence and going through family court proceedings often do not take out protection orders. Women often only do so as a last resort, after being subjected to repeated and serious victimisation: if they have been severely beaten, have been injured, or have children. And protection orders do provide an effective means of reducing women's vulnerability to violence.

Myth: False allegations of child abuse

A related myth is that women routinely make false accusations of child abuse in family law proceedings. In fact, allegations of child abuse are rare. For example, they represented five to seven per cent of all disputes in children's matters before the Family Court of Australia, according to a study in 1995-96. In any case, given the prevalence of child abuse in the general population, one should not be surprised that a proportion of family court cases involve allegations of abuse.

Child abuse allegations in the context of family law have been analysed in four Australian studies. These examinations find that allegations rarely are made for tactical advantage, false allegations are rare, the child abuse often takes place in families where there is also domestic violence, and in any case, such allegations rarely result in the denial of parental contact.

Protecting perpetrators

As well as attempting to discredit female victims of violence, fathers' rights groups have tried to wind back the legal protections available to victims.

For example, some fathers' rights groups argue that people alleging violence should only be able to rely on police and hospital records, and that if their allegations are not substantiated, they should be charged with perjury and subject to criminal prosecution.

Fathers' rights groups also have tried to wind back the legal sanctions imposed on perpetrators. For example, the Lone Fathers' Association argues that domestic violence interventions should aim above all to keep the family together, rejects pro-arrest policies, and calls for the greater use of mediation and counseling (DOTA, 2005; LFA, pp. 27-45). This last recommendation reflects the misguided view that domestic violence is best understood as "marital discord" and the responsibility of both parties, rather than a systematic exercise in power and control.

Such reforms would represent a profound erosion of the protections and legal redress available to the victims of violence. While fathers' rights groups often claim to speak on behalf of *male* victims of domestic violence, these efforts undermine the policies and services that would protect and gain justice for these same men.

The ongoing influence of FR groups and perspectives

I now want to briefly explore recent developments in family law, and the influence of fathers' rights groups in these.

The reforms in family law made in 1995 were intended to bring about a normative shift towards 'shared parenting'. They included the guiding principle that 'children have a right of contact, on a regular basis, with both their parents' (Rhoades et al., 2002, p. 64).

However, since the 1995 changes there has been no increase in shared parenting among separated partners (Rhoades et al. p. 1). Parents who do enter into workable shared residence arrangements after separation are doing so without legal assistance and without any knowledge of the *Family Law Reform Act*. On the other hand, the reforms have increased the frequency of joint residence orders in the context of distrust, hostility and violence between ex-partners, raised many men's expectations that they now have an automatic 'right' to shared parenting, created greater scope for abusive non-resident parents to harass or interfere in the life of the child's primary caregiver, and increased the number of disputes about contact (Rhoades et al.).

An uncritical assumption that children's contact with both parents is necessary pervades the courts and the media, although the legislation makes it clear that children's 'right' to contact with both parents only operates to the extent that such contact is found to be in the child's best interests (Rhoades et al., 2002, p. 6).

The evidence is that the 'right to contact' aim of the 1995 reforms is overriding the 'safety from violence' aim. This is clearest in the Family Court's approach to contact when allegations of domestic violence are raised (Rhoades et al., pp. 73-74). The Court now is more likely to make interim orders for children's unsupervised contact in cases involving domestic violence or child abuse, to use hand-over arrangements rather than suspend contact until trial, and to make orders for joint residence where there is a high level of conflict between the separated parents and one parent strongly objects to shared residence. There has been a large increase in the numbers of contravention applications by non-resident parents alleging breaches of contact orders, and many are being pursued as a way of harassing the resident parent rather than a genuine grievance about missed contact (Rhoades et al., pp. 6-9).

This situation threatened to worsen in 2003 when, in alliance with conservative Christian groups and socially conservative politicians, fathers' rights groups were successful in establishing a government inquiry into a *formal* presumption of joint residence after separation (Nicholson, 2004).

The proposed legislative presumption of shared residency threatened to expose women, children and men to higher levels of violence. Separated parents would be required to prove why shared residency should not occur in cases where an ex-partner has been or continues to be violent, an arrangement at odds with measures being taken in Australia and overseas to work from a presumption of no contact for a perpetrator of violence (Kaye et al., 2003, p. 149). Women or men subject to violence in relationships might be further discouraged from leaving the relationship for fear of their children's safety should joint residency be enforced. Many victims of domestic violence do not report this and would struggle to demonstrate why a perpetrator should not have shared residency of children. And the legal presumption would create further avenues through which perpetrators of domestic violence can harass ex-partners and children.

The House of Representatives report recommended against the adoption of a rebuttable presumption of joint residence. However, the Federal Government has continued to propose reforms to family law informed by perspectives which the fathers' rights movement share, reforms which privilege formally shared parenting over children's safety.

In November 2004, the Attorney-General's Department released the Discussion Paper *A New Approach To The Family Law System*. Key elements of these latest proposed reforms threaten to heighten the likelihood of violence and abuse during and after separation. The Family Relationship Centres will screen only very shallowly for violence and abuse. Parents will be 'required to consult' with the other parent in making key decisions regarding children, regardless of that parent's degree of contact with the child. Where parents disagree, processes of dispute resolution will be compulsory and non-participation will attract highly punitive sanctions. People can be exempted where there is violence or child abuse, but court costs may be imposed where an allegation of abuse cannot be substantiated, despite the fact that abuse is very difficult to substantiate especially when it is non-physical. These changes will discourage victims from alleging violence for fear of being unable to substantiate their claims.

Further legal sanctions will be imposed on resident parents who do not maintain shared parenting responsibilities after separation, while non-resident parents who fail to maintain contact receive no penalty. Mothers who disobey contact orders often do so to protect their children from ongoing abuse, but they will face additional pressure to agree to parenting plans under duress (DVIRC, 2005, p. 22). Where a resident parent has deliberately breached a contact order more than once, they may lose residence of the child to the other parent (Attorney-General's Department, 2004, p. 13). In short, such reforms will mean that greater numbers of parents who are the victims of violence will be subject to further violence and harassment by abusive ex-partners, while children will face a greater requirement to have contact with abusive or violent parents.

The Government's Discussion Paper echoes many of the key themes of the fathers' rights movement. It shows a preference for a parenting arrangement that is neither ideal nor practical for most families, while offering nothing to improve family law's responses to victims of violence. Both bodies are guided by two central, and erroneous, assumptions: that all children see contact with both parents as in their best interests in every case, and that a violent father is better than no father at all (DVIRC, 2005, pp. 5-6).

The Australian Government's proposal for 'equal shared parental responsibility' is not as coercive or dangerous as the fathers' rights movement's agenda of mandatory joint residence. But both threaten to undermine the primacy of the best interests of the child in determining post-separation arrangements and threaten the safety of women, men and children.

Responding to separated men

So far I have offered a range of criticisms of the agendas and claims of fathers' rights groups. But what about separated men themselves? There is no doubt that we need to provide constructive, accountable and professional services and resources for men. If men who have gone through painful divorces and messy custody proceedings, men who are hurting and confused, can find access to such services, they will be able to work through this in ways that are healthy and safe.

While fathers' rights groups claim to advocate on behalf of separated men, some groups do little to help separated men build or sustain ongoing relationships with their children or even hinder this. For example, some FR groups encourage feelings of anger and blame, fixing men in positions of victimhood and hostility, rather than helping them to heal.

Community-based groups for separated fathers could be an important source of support and community. But they must operate in responsible and accountable ways. And ideally, they would work in tandem with similar programs and groups run in the community sector.

Conclusion

The fathers' rights movement will continue to seek an equality concerned with fathers' 'rights' and status rather than the actual care of children (Rhoades, p. 156). The fathers' rights movement

will continue to pursue 'equality with a vengeance' (Rhoades, 2000, p. 155). It prioritises formal principles of equality over positive parenting and the well-being of women and children, conflates children's welfare with parental equality and ignores actual caregiving divisions of labour. Its advocates will persist in trying to re-establish paternal authority and fathers' decision-making related to their children's and ex-partners' lives (Bertoia & Drakich, 1993; Cornell, 1998, pp. 185-187; Stacey, 1998, pp. 56-57).

And fathers' rights groups will persist in ignoring the real obstacles to shared parenting both in couple families and after separation or divorce (Flood, 2003, pp. 50-64). Just to make a single point here, the most most important obstacle to fathers' parenting after separation is their absence from parenting *before* separation. But fathers' rights groups have done nothing to encourage fathers' involvement with children before separation.

The new politics of fatherlessness has not yet been entirely captured by the fathers' rights movement. The fact that debates over family politics and family values are focusing on fathers has the potential to foster men's positive involvement in parenting and families.

In Australia, key resources for realising the progressive potential of contemporary fatherhood politics also include the widespread imagery of the nurturing father, growing policy interest in addressing divisions of labour in child care and domestic work, and men's own investments in positive parenting. However, thwarting the fathers' rights movement's backlash requires that we directly confront the movement's agenda, disseminate critiques of its false accusations, and respond in constructive and accountable ways to the fathers (and mothers) undergoing separation and divorce (Flood, 2004, pp 274-278).

References cited

- Attorney-General's Department. (2004). *A new approach to the family law system: Implementation of reforms - Discussion paper*. ACT, Australia: Consultation Secretariat, Family Law and Legal Assistance Division, Attorney-General's Department, Commonwealth Government.
- Brown, T., Frederico, M., Hewitt, L., & Sheehan, R. (2001). The child abuse and divorce myth. *Child Abuse Review*, 10, 113-124.
- Doherty, W. J. (1997). The best of times and the worst of times: Fathering as a contested arena of academic discourse. In A. J. Hawkins, & D. C. Dollahite (Eds.), *Generative fathering: Beyond deficit perspectives*. Thousand Oaks, CA: Sage.
- DOTA (Dads On The Air). (2005). Response to the discussion paper, A new approach to the family law system: Implementation of reforms. Sydney, Australia: Dads On The Air.
- Flood, M. (2003). *Fatherhood and fatherlessness* (Discussion Paper no. 59). Canberra: The Australia Institute. [Copy available free from author on request.]
- Flood, M. (2004). Backlash: Angry men's movements. In S. E. Rossi (Ed.), *The battle and backlash rage on: Why feminism cannot be obsolete* (pp. 261-278). Philadelphia, PA: Xlibris Press. [Copy available free from author on request.]
- Jordan, P. (1998, June 9-11). *The effects of marital separation on men 10 years on*. Proceedings of the National Forum on Men and Family Relationships, Canberra, Australia.
- Kaye, M., Stubbs, J., & Tolmie, J. (2003, June). *Negotiating child residence and contact arrangements against a background of domestic violence* (Research Report no. 1). Queensland, Australia: Griffith University, Families, Law and Social Policy Research Unit.

- Lone Fathers Association Australia. (2004). Protection orders legislation review. (ACT). Discussion Paper: Comments by Lone Fathers Association. (Australia). Inc. Canberra.
- Melville, A., & Hunter, R. (2001). 'As everybody knows': Countering myths of gender bias in family law. *Griffith Law Review*, 10(1), 124-138.
- Rhoades, H., Graycar, R., & Harrison, M. (2002). *The family law reform act 1995: The first three years*. Sydney, NSW: University of Sydney and Family Court of Australia.
- Silvey, J., and Birrell, B. (2004). Financial outcomes for parents after separation. *People and Place*, 12(1), pp. 46-57.
- Smyth, B., Sheehan, G., & Fehlberg, B. (2001). Post-divorce parenting patterns: A summary of findings from the institute's Australian divorce transitions project. *Family Matters*, 59, 61-63.
- Trimboli, L., & Bonney, R. (1997). *An evaluation of the NSW apprehended violence order scheme*. Sydney: NSW Bureau of Crime Statistics and Research.
- Wolffs, T., & Shallcross, L. (2000). Low income parents paying child support. *Family Matters*, 57, 26-33.
- Young, M., Byles, J., & Dobson, A. (2000). The effectiveness of legal protection in the prevention of domestic violence in the lives of young Australian women. *Trends and Issues in Crime and Criminal Justice*, 148, 1-6.

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Further resources and reading

Critiques of 'fathers' rights' and 'men's rights' claims about family law, violence, custody, etc.:

<http://www.xyonline.net/articles.shtml#Violence>

<http://www.xyonline.net/articles.shtml#father>

Published academic critiques of fathers' rights perspectives:

<http://mensbiblio.xyonline.net/fathering.html#Heading1042>

Published academic critiques of men's rights perspectives:

<http://mensbiblio.xyonline.net/mensrights.html#critiques>

Web critiques of men's and fathers' rights:

<http://www.xyonline.net/links.shtml#24>

A short critique of fathers' rights and men's rights perspectives:

<http://www.xyonline.net/Respondingtomen.shtml>