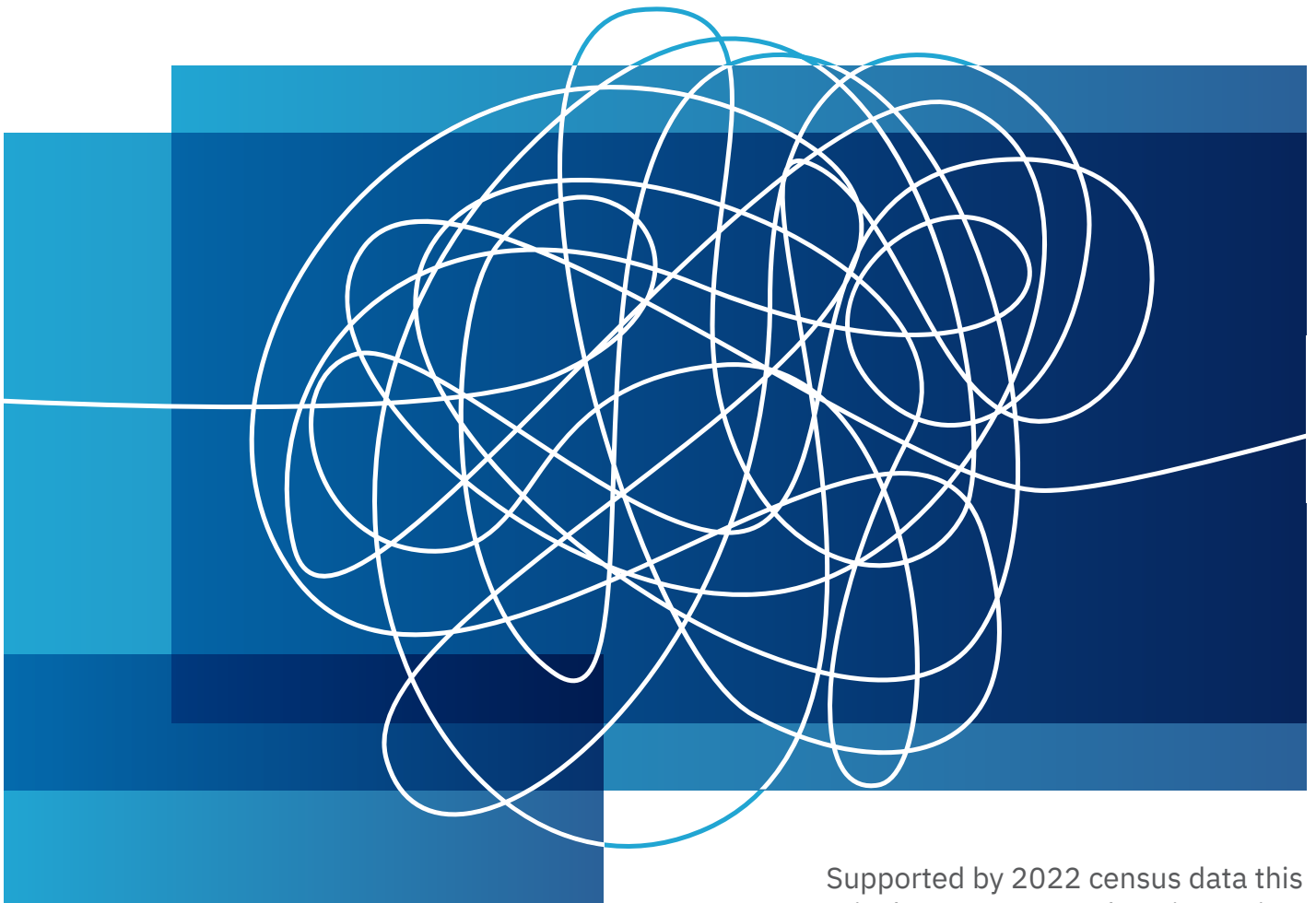


# Australian Relationships

## Love, Marriage, and Divorce in a Modern Nation



Supported by 2022 census data this is the most comprehensive review into legal relationships in Australia, what impacts them, societal attitudes, and our legal frameworks.

All seen through the eyes of Australia's largest and only national Family Law Firm - AF Legal Group Ltd

# Preface

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As lawyers it is our great privilege to use our skills to help Australians in need of family law advice. At AF Legal Group Limited we occupy a unique position in Australia's legal landscape. Not only are we the only national specialist family law firm, we're also the largest. We are exposed to aspects of relationships over many demographics in contemporary settings in the modern world.

Since embarking on my family law career over 25 years ago, I have observed many societal and legislative changes, the most significant including the inclusion of de facto financial matters in the Family Law Act to create uniformity in the law between marriage and de facto relationships following separation, the introduction of Financial Agreements, often known colloquially as "pre-nups", as a way for couples to privately manage their financial relationships in the event of separation and most recently the legalisation of same sex marriage in Australia.

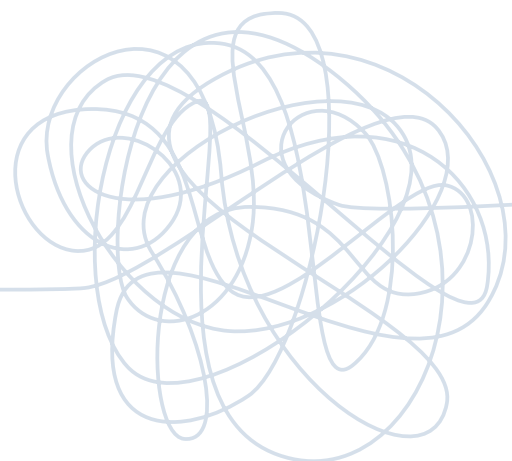
There are few areas of the law that are as impacted and tied to societal change. Family, often described as the bedrock of society, is a complex tapestry woven from the threads of love, commitment, and the intricacies of human relationships. Within this delicate fabric, the legal framework known as family law plays a vital role in guiding, protecting, and resolving the intricate issues that can arise within families. As the dynamics of families evolve and society undergoes profound changes, the realm of family law must adapt and respond to the shifting needs of individuals and communities.

This report is the culmination of extensive research, rooted in a diverse range of sources including statistics from the most recent Australian Bureau of Statistics National Census and the invaluable experiences of legal practitioners at AF Legal Group Limited. As the only publicly listed family law firm in the world, we discuss the intricate nuances, emerging challenges, and transformative possibilities that define family law in the context of contemporary society. In this resource, we share invaluable insights on topics such as marriage, de facto relationships, divorces and separations, workplace relationships and harassment, surrogacy, and IVF.

As coined by contemporary media, we are now traversing the ‘era of divorce,’ driven to a large extent by extended lockdowns and the rising cost of living, more and more pressures are impacting modern day love. We delve into the reasons Australians are choosing to separate, as unprecedented strain exacerbates relationship issues. We share our firsthand, on-the-ground experiences. By the conclusion of this report, it is our sincere hope that you will be armed with knowledge and insights to engage thoughtfully with the complexities of modern day relationships and family law and how these trends impact our communities, friends, colleagues and loved ones.



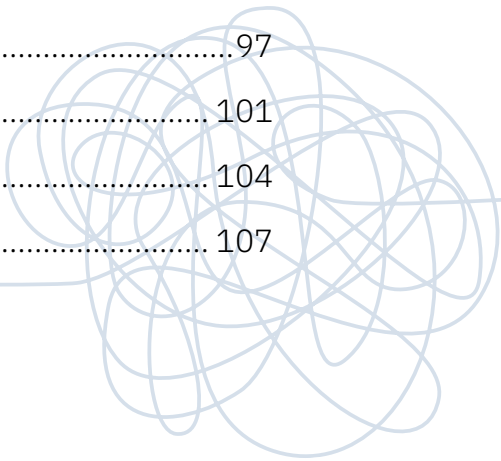
**Jackie Vincent**  
**Legal Practice Director**



# Contents

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Australian Relationships at a Statistical Glance .....	5
On Married Couples & Divorce.....	9
De Facto Relationships.....	14
Same Sex Marriage .....	19
Why Do People Divorce? .....	24
Binding Financial Agreements.....	29
The Impacts of Separation on Children .....	33
Adoption .....	38
Domestic Violence.....	44
The Family Law System.....	51
The Cost of Family Disputes.....	58
Abortion.....	66
Pornography.....	72
Online Dating.....	79
Workplaces.....	83
Family Law Miscellanea.....	90
Prostitution.....	91
IVF.....	93
Surrogacy.....	95
Race & Religion .....	97
Overall Trends .....	101
Acknowledgments.....	104
References .....	107



The background of the page is a complex, layered image of financial data. It features a dark blue background with various charts and lines. In the upper portion, there are vertical bars in shades of red and teal, resembling a bar chart or candlestick chart. Below these, there are several overlapping line graphs in different colors (red, teal, yellow, green). A prominent feature is a large, semi-transparent blue rectangular area in the lower right quadrant, which contains the chapter title. To the left of this area, there is a white, abstract scribble consisting of many overlapping, tangled lines. The overall aesthetic is modern and data-driven.

CHAPTER 1  
Australian Relationships  
at a Statistical Glance

To set the scene we take a summative view of marriage and divorce rates across the nation.

The following statistics were drawn from the latest Australian Bureau of Statistics release for Marriage and Divorce as of November 2021<sup>2</sup>.

## The States and Territories at a Glance

State	Marriages	Divorces
New South Wales	27,311	17,126
Victoria	18,738	12,766
Queensland	21,627	13,475
South Australia	6,781	3,863
Western Australia	10,305	5,989
Tasmania	2,329	1,142
Northern Territory	794	461
Australian Capital Territory	1,282	1,422

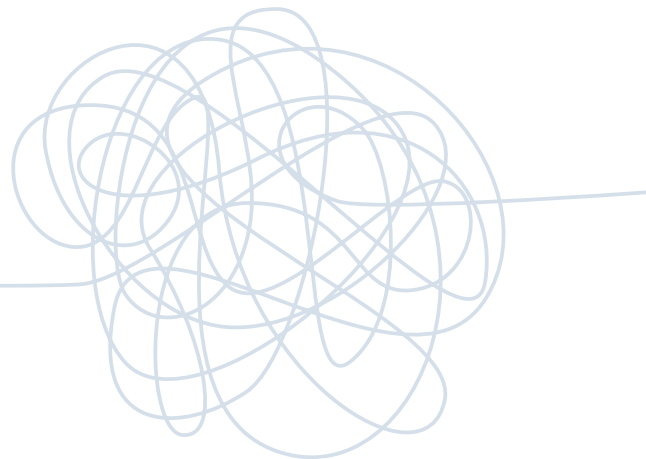
Queensland was the divorce capital of Australia in 2021. There were 2.6 divorces per 1,000 Queenslanders, well above the national crude divorce rate of 2.2 per 1,000.

## National Divorce and Marriage at a Glance



**56,244 divorces were granted in Australia in 2021. This is an increase of 13.6% when compared to the 2020 figures.** According to the Federal Circuit and Family Court of Australia, this statistical spike can be partly attributed to administrative changes in the courts which have reduced the timeframes for divorces.

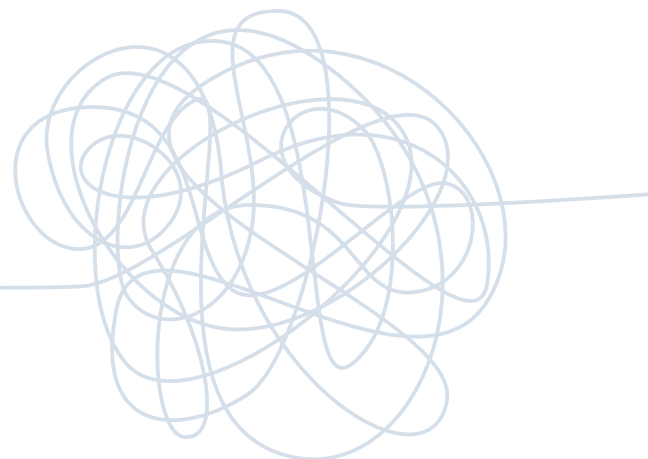
- › The median duration between marriage and divorce was 12.2 years. Nearly half of the divorces granted in 2021 (47.8%) were for couples with children under the age of 18.
- › The median age of the Australian man at marriage was 29.6 years, 41.9 at separation, and 45.9 at divorce.
- › For women this changes to 27.3 years old at marriage, 39.1 at separation, and 43.0 at divorce.



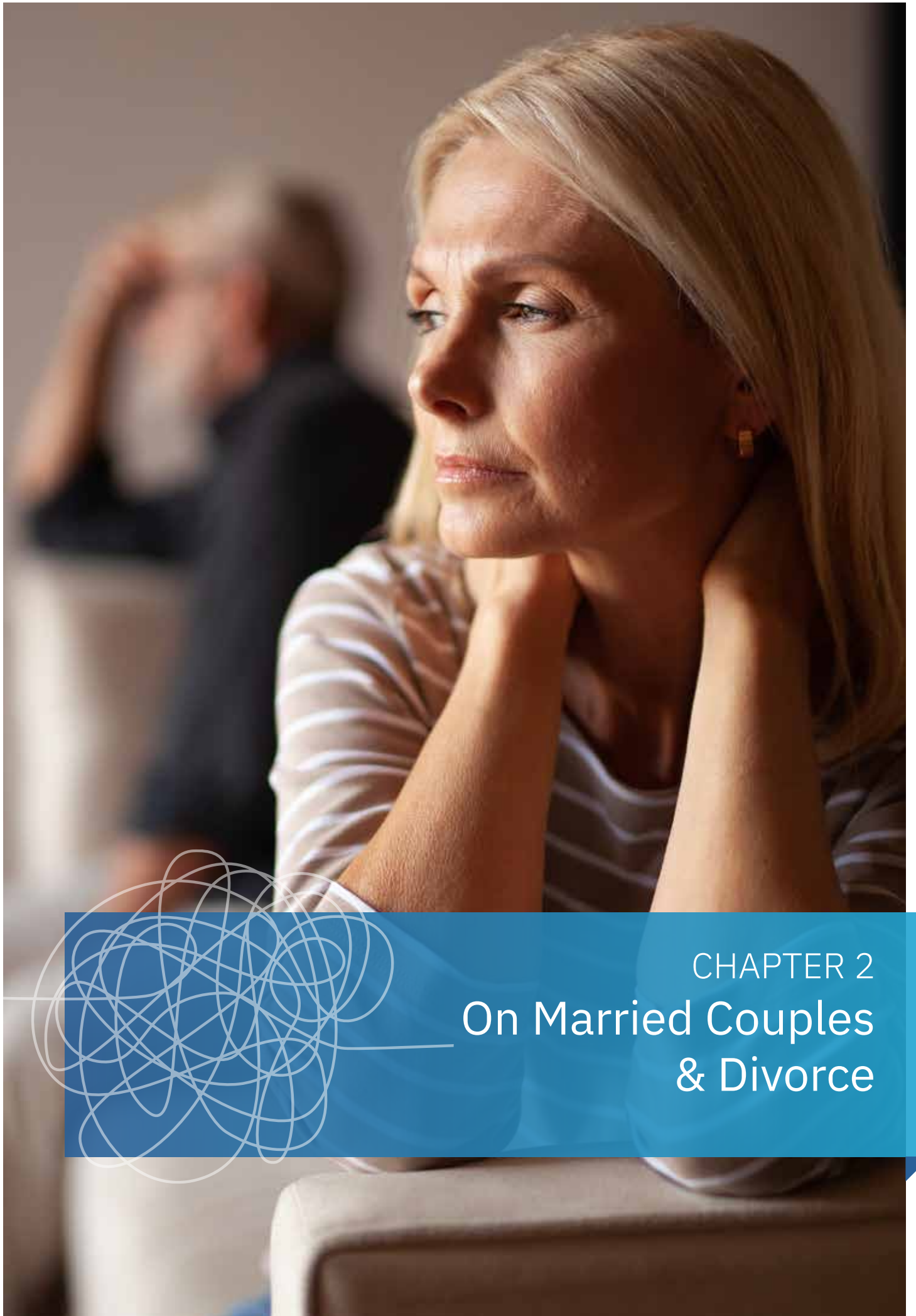
## Same Sex Marriage at a Glance

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- › There were 2,842 same sex marriages registered in 2021 in Australia, a slight decrease of 60 same sex marriages (2.1%) compared with 2020. Same sex marriages make up 3.2% of all marriages in Australia.
- › More female same sex marriages occurred in Australia than male same sex marriages in 2021. In fact, of the 473 same-sex marriages recorded in 2021, 306 of these were female same sex-couples.







CHAPTER 2  
On Married Couples  
& Divorce

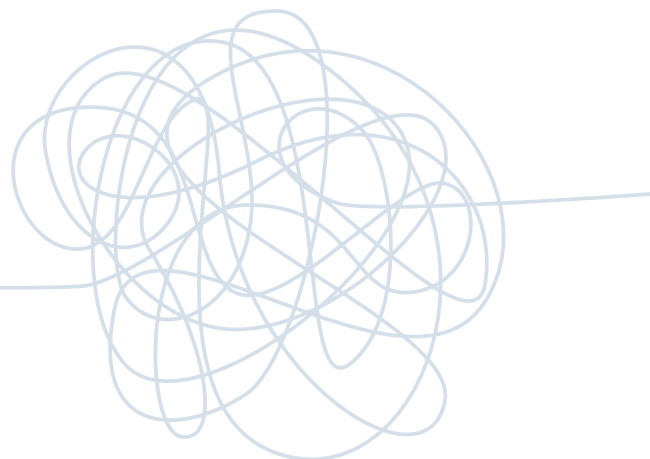


## Background

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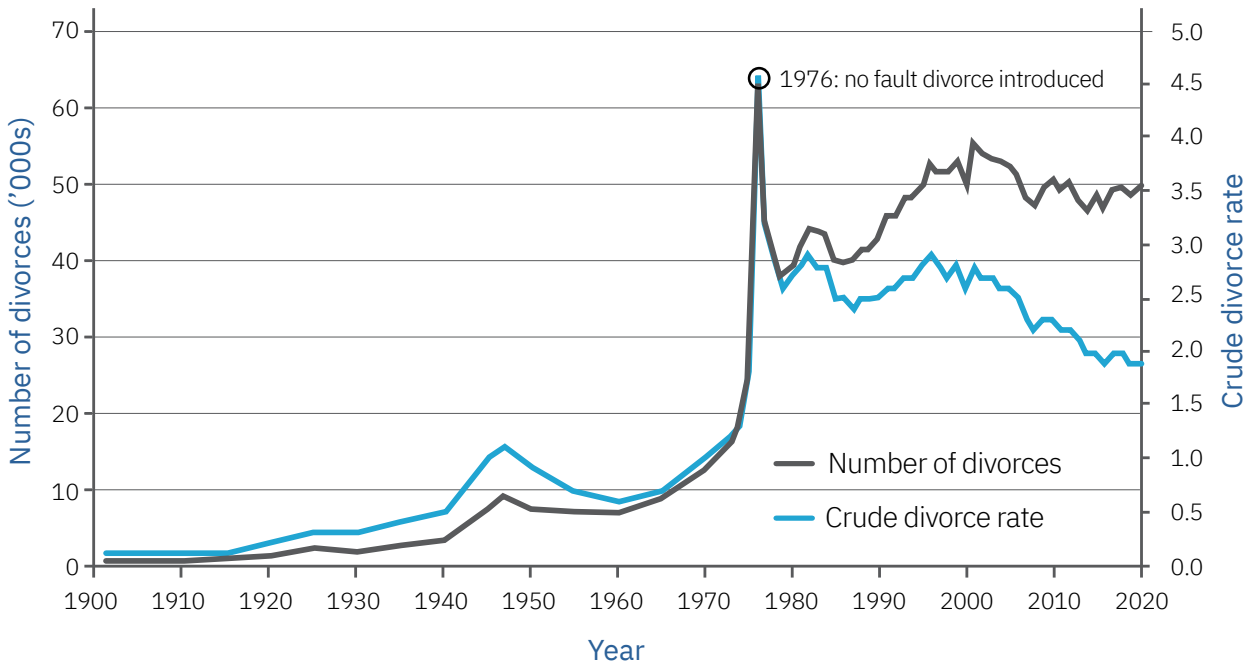
The ritual dates back to the Middle Ages in Britain.<sup>1</sup> A tangle of hands reaching skyward, all jostling and competing like AFL players for a mark. The contest is based on an old superstition: whoever catches the bridal bouquet will be the next to tie the knot.<sup>2</sup>

While traditionally, the bouquet's new owner is the subject of envy, the reality is that Australians are increasingly choosing not to marry. The marriage rate has dropped by a third (33.9%) over the last two decades.<sup>3</sup> Divorce is far more accessible with the introduction of the Family Law Act, and the advent of no-fault divorce.<sup>4</sup>



## Statistics

- › Approximately a third of marriages in Australia end in divorce. This is lower than the American rate of 45%.<sup>6</sup>
- › Tasmania reported the highest percent of divorcees of all Australian states and territories at 10.3%.<sup>7</sup> The Northern Territory had the lowest at 7.4%.<sup>8</sup>
- › In the 2021 census, 1,831,952 Australians were divorced.<sup>9</sup> This is 8.8% of the population over the age of 15.<sup>10</sup>
- › 8,747,135 Australians said they were married.<sup>11</sup>



Source: Australian Institute of Family Studies.<sup>12</sup>

In 2020, we saw hospitals overrun, Netflix subscriptions soar,<sup>13</sup> and the largest drop in marriages ever recorded by the Australian Bureau of Statistics.<sup>14</sup> Discounting this pandemic-induced outlier, the number of marriages has stayed largely stable over the last two decades.<sup>15</sup> However, in the context of a rapidly growing Australian population, this represents a significant decline in the prevalence of marriage. Since 1970, the Australian population has doubled, and marriages per capita have halved.<sup>16</sup>

The fall of traditional marriage has coincided with the rise of a less formal arrangement: the de facto relationship. In 2009, reforms to the Family Law Act afforded de facto partners many benefits formerly reserved for married couples.<sup>17</sup> Since 2011, the number of Australians in de facto relationships has increased by 46.8%.<sup>18</sup> (See Chapter 3 for more information on de facto relationships.) This trend recontextualises the falling marriage rate. The sum of marriages and de facto relationships, as a percentage of the over-15 Australian population, has remained largely stable over the last decade. Australians have not abandoned romance. They are merely distancing themselves from the institution of marriage.

TABLE 1

	2011	2016	2021
Australia’s over 15 population	15,536,806	16,777,845	18,779,406
In registered marriages	7,647,042 49.2%	8,001,141 47.7%	8,747,135 46.6%
In de facto relationships	1,476,368 9.5%	1,751,731 10.4%	2,168,351 11.5%
In marriages & de factos	9,123,410 58.7%	9,752,872 58.1%	10,915,486 58.1%

The breakdown of a relationship – whether a registered marriage or a de facto relationship – can be messy, costly, and painful. At a glance, the national trend of decreasing divorce might spark hope in the Aussie romantic. Perhaps families are staying together, and partners are finding ways of making it work? However, fewer couples saying ‘I do’, may naturally mean that fewer are saying ‘I don’t’. Evidenced by the national decline in divorce corresponding with the falling marriage rate.

## Community Attitudes

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Marriage predates recorded history. Over time societal views on marriage, divorce, and relationships have radically changed. The previous stigma assigned to premarital cohabitation and unwedded co-parenting is no longer prevalent in modern Australia. Over a third of children born in 2020 were outside of wedlock.<sup>20</sup>

Marriage and divorce have evolved with changes in society. In 1971 over 85% of Australians identified as Christian, and religious ministers performed 88% of our marriages.<sup>21</sup> In the 2021 census, less than half of the country identified as Christian.<sup>22</sup>

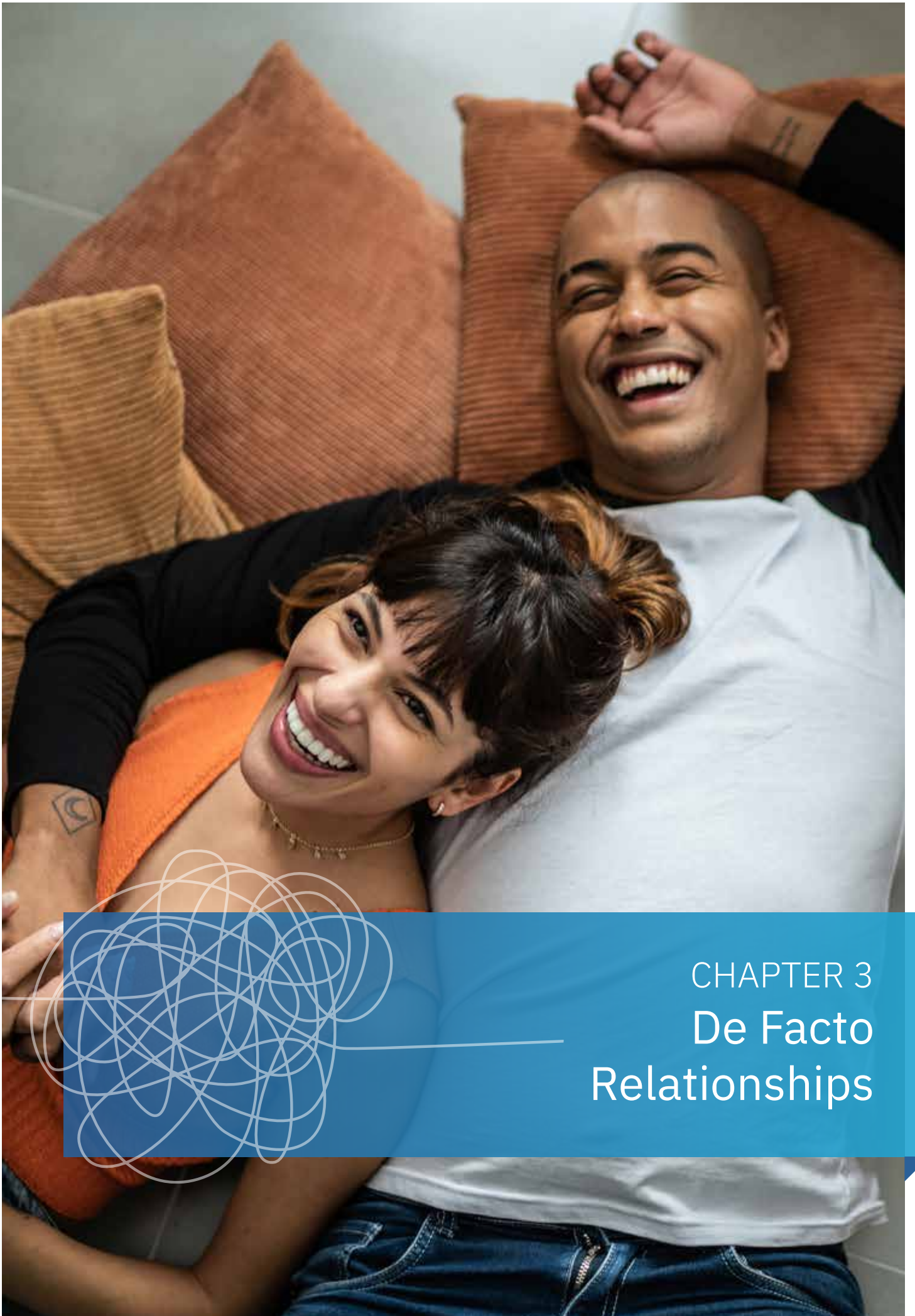
Today, civil celebrants perform most marriages.<sup>23</sup> In addition, surveys show that Australians are more accepting of couples living together without any intention to marry and see divorce as a preferable alternative to an unhappy marriage.<sup>24</sup> This has freed many Australians to form relationships on their own terms and resulted in the rise of de facto relationships.

## Legal Position

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Like society the legal landscape has changed over time to allow people to divorce in a broader set of circumstances. The power to legislate on marriage and divorce is granted to the Federal Government by the Constitution of Australia.<sup>25</sup> For Australian families, the legal landscape has changed dramatically since Federation. Prior to the introduction of the Family Law Act in 1975, divorce was fault-based, and marriage could only be dissolved by establishing cruelty, insanity, or any of the other restrictive grounds set out in *Matrimonial Causes Act 1959*.<sup>26</sup> The introduction of no-fault divorce meant that the only grounds needed was the irretrievable breakdown of marriage, as evidenced by 12 months of separation.<sup>27</sup>





CHAPTER 3  
De Facto  
Relationships



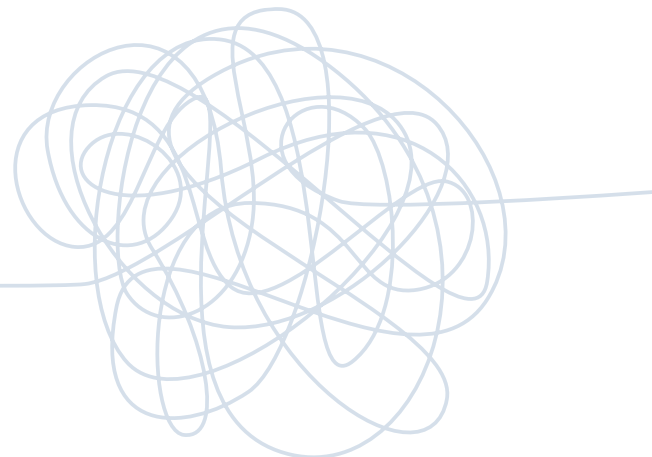
## Background

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*“You’ve signed the lease and hired a moving truck. You and your partner have decided to move in together. You’re excited, but also trying to figure out whether all of your furniture will get through the front door, and which cupboard is going to host the coffee mugs. The last thing on your mind is the legal consequences of your cohabitation. But it shouldn’t be. Two years (or sometimes less depending on the circumstances) after moving day, you might unwittingly belong to one of Australia’s fastest growing relationship categories: the de facto.<sup>1</sup>”*

A de facto relationship is two people living together on a ‘genuine domestic basis’<sup>2</sup> who are not related and not married. Since the 2008 amendment of the Family Law Act, de factos’ rights regarding taxation, government benefits, and separation have been relatively aligned with those of married couples.<sup>3</sup> These changes were motivated by a desire to extend marriage-like rights to couples, both heterosexual and same-sex, in a political climate unready for outright marriage reform.<sup>4</sup>

When Australia legalised same-sex marriage in 2017, the original intent of the 2008 reforms became less significant. Nonetheless, de factos of all sexual orientations retain the rights established more than a decade ago, even if they choose not to exercise the right to marry, and people in such relationships now make up 11.5% of Australia’s over-15 population.<sup>5</sup>

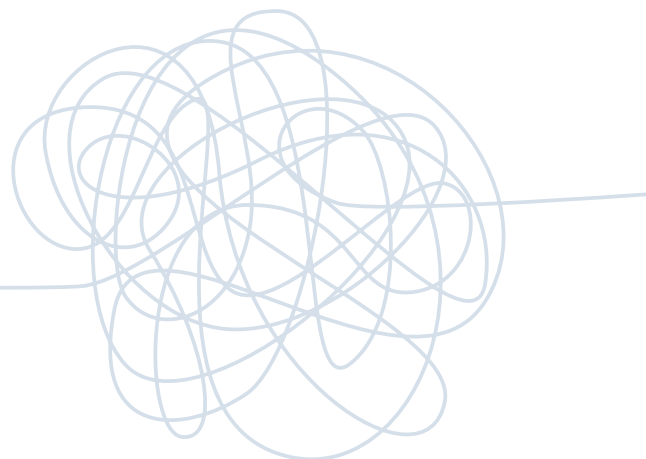


## Statistics



**Those in de facto relationships have risen from 9.4% of people over 15 in 2011, to 11.5% in 2021.<sup>6</sup>**

- › The 2021 Australian Census counted 2,168,351 people in de facto relationships.<sup>7</sup>
- › New South Wales has more de factos than any other state in Australia (637,046). However, by population, it has the lowest percentage of de factos in the nation.<sup>8</sup>
- › Darwin has the highest percentage of its population describing themselves as in a de facto relationship of any Australian capital city at 16%, 4.5 percentage points above the national average.<sup>9</sup>





While the number of de facto relationships has seen a meteoric rise over the last decade, their exact number is actually more difficult to gauge than that of marriages and consequently divorces. While each state maintains its own de facto relationship register, these are inefficient measurement tools, as it is not necessary to register a de facto relationship for it to qualify as a de facto relationship. Despite the rising rate and lasting legal implications of de facto relationships, there is no accurate way of knowing how many there are within any state or territory, or within Australia as a whole.

The meteoric rise in couples who live together outside of marriage corresponds with the trend of declining marriage rates in Australia. *For more information see Chapter 2: On Married Couples and Divorce.*

## Community Attitudes

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*‘I know this love of mine will never die.’*

*Paul McCartney in ‘And I love her’ (1964). Released four years prior to his then fiancée, Jane Asher, breaking up with him on live TV.*

We’ve all heard of ugly divorces. Assets argued down to the last penny, and children caught in the crossfire. You don’t have to be married for this to happen. Separating from a partner after being in a de facto relationship will involve the division of assets, including cash, real estate, and even superannuation, if they exist. It can also involve the payment of maintenance from one ex-partner to the other, in addition to the payment of child support for children.<sup>11</sup>

The result is that these Rudd-era reforms have often been criticised for burdening couples who have deliberately forgone marriage and its legal complications.<sup>12</sup> Newlyweds know that they’ve just entered into a binding legal contract. However, many couples are unaware that their housewarming sets the stage for a similar obligation. While a binding financial agreement can protect assets in the event of a separation, it’s of little consolation to those ignorant of their de facto status.<sup>13</sup>

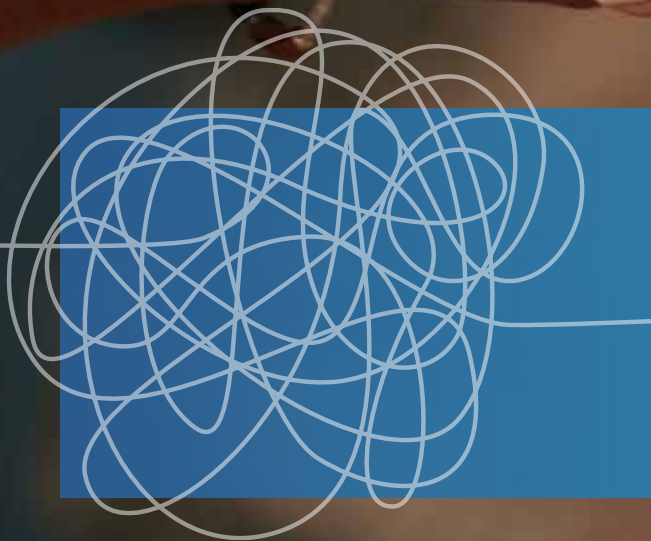
## Legal Position

It was only by constitutional amendment in 2008 that the federal government gained jurisdiction over financial matters arising out of the breakdown of de facto relationships in Australia.<sup>14</sup> A year later, 2009 amendments to the Family Law Act gave de facto couples the ability to apply to the then Family Court and Federal Magistrates Court (now Federal Circuit and Family Court of Australia) for resolution of post-separation asset disputes and parenting arrangements.<sup>15</sup>

The Family Law Act also provides a list of factors for the courts to consider when assessing whether a de facto relationship in fact exists. By law, a de facto relationship is not just formed by romantic cohabitation, but by a consideration of all the circumstances surrounding the relationship.<sup>16</sup> While no one factor determines the existence or otherwise, of a de facto relationship, factors to be considered include the degree of cohabitation, the degree of financial dependence, the existence of a sexual relationship, the reputation and public aspects of the relationship, and the relationship's duration.

In applying these factors, the High Court has determined that a de facto relationship was not necessarily severed by ceasing cohabitation, even in cases of mental incapacity.<sup>17</sup> Another court found that a 17-year relationship was not a de facto, as it was kept secret, and the couple did not present as such to the public.<sup>18</sup> Notwithstanding this finding, it is legally possible for one person to be in a marriage and in a de facto relationship with another person, at the same time.<sup>19</sup>

While de facto relationships have become a regular part of Australia's legal landscape, they are not recognised universally outside of Australia.



CHAPTER 4  
Same Sex Marriage

## Background

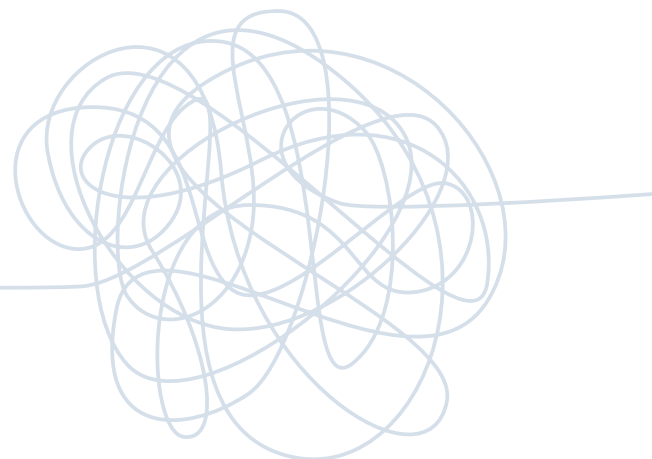
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It was the 18th of June 2004 and sporadic rain dampened the finely manicured lawns of Canberra.<sup>1</sup> That day in Parliament House, the Howard government sought to amend the law to define marriage and to prevent same sex marriage, and introduced the *Marriage Amendment Bill 2004* (Cth). This Bill proposed to amend the *Marriage Act 1961* (Cth) to confine the institution of marriage to ‘the union of a man and a woman to the exclusion of all others, voluntarily entered into for life.’<sup>2</sup> The Bill passed on its second reading, with minimal opposition from Labour.<sup>3</sup>

13 years later, buoyed by the rising tide of public opinion, the Turnbull government assented to a voluntary postal survey of all Australians on the question of same-sex marriage.

In 2017, 61.6% of Australians voted in favour of legislative change, and the *Marriage Act 1961* (Cth) was amended accordingly.<sup>4</sup>

The Marriage Amendment (Definition and Religious Freedoms) Act 2017 (Cth), which legalised same-sex marriage, passed the Australian Parliament on the 7th of December 2017 and received royal assent from the Governor-General on the 8th of December 2017. Same-sex marriages in Australia have been legal since the 9th of December 2017. On the 15th of December 2017, Australia saw its first same-sex marriage ceremony.<sup>5</sup>

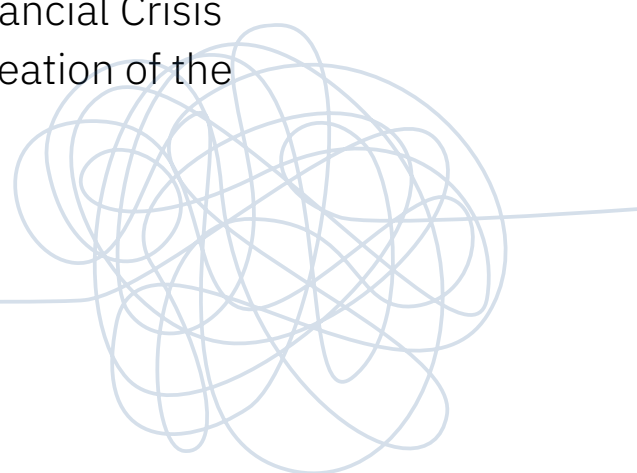


## Statistics



**In 2021, 23,914 same-sex marriages were counted in the Census.<sup>6</sup> It is the first Census since same-sex marriage was legalised in Australia in 2017.**

- › Australia has been the only country, apart from the Republic of Ireland, to legalise same-sex marriage through a national vote.<sup>7</sup>
- › In 2017, out of all the Australian States and Territories, NSW had the highest percentage of ‘no’ votes (42.2%) and the ACT had the lowest (26%).<sup>8</sup>
- › In 2018, Australians voted same-sex marriage ‘the most historic event to have shaped the lives of Australians’ ahead of September 11, the Global Financial Crisis and the creation of the Internet.<sup>9</sup>



*‘Until we’re counted, we’ll remain invisible.’*

*Equality Australia Chief Executive Officer Anna Brown on the 2021 Census<sup>10</sup>*

The 2021 Census is the first since the legalisation of same-sex marriage. As a comprehensive demographic measure, the Census is a critical tool which shapes academic insights, informs the development of policy, and drives the allocation of government resources. Despite concerted campaigning by advocates and experts, no questions on gender identity or sexual orientation were included in the latest Census.<sup>11</sup> As the Census is a critical tool for addressing the community’s needs, the exclusion of these questions seems a considerable missed opportunity for policy makers.

Dr David Gruen, Chief Statistician of the Australian Bureau of Statistics, sums up the 2021 Census’ value for the LGBTQI community, ‘The 2021 Census did not collect information on gender identity and so it can’t be used to infer information on gender identity’.<sup>12</sup> The Census was able to collect data on the number of same-sex marriages and cohabiting couples, but ignored single or unmarried LGBTQI Australians. For groups that have long faced discrimination, this exclusion feels like a regression.

## Community Attitudes

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On the 26th of July 2022, Des Hasler, coach of the Manly Sea Eagles, wrung and steepled his hands while reading his statement to the assembled press. Mr Hasler and his team had found themselves the centre of controversy after seven players refused to don the team’s Pride jersey. ‘The NRL is for everyone’, he insisted.<sup>13</sup> In the wake of this controversy, LGBTQI Australians would be justified in feeling that, regrettably, not everyone is for them.

Acceptance and support for LGBTQI rights is growing, with 81% of Australians in favour of societal acceptance of homosexuality.<sup>14</sup> Of course, the LGBTQI community is not just confined to people identifying as homosexual. It also includes people who identify as bisexual, transgender, intersex, queer, asexual and other sexually or gender diverse people. Some holdouts remain, most notably in the religious community.

In August 2022, a group of conservative bishops split from the Australian Anglican Church to form a new breakaway diocese. The battlegrounds for this schism: same-sex marriage. The leader of the Diocese of the Southern Cross, Bishop Condie, has stated that ‘revisionist teachings’ in favour of same-sex marriage ‘forced this situation’. At a recent Synod, a council convened to decide issues of doctrine, decisions made ‘opened the way to blessing of same-sex marriage’.<sup>15</sup>

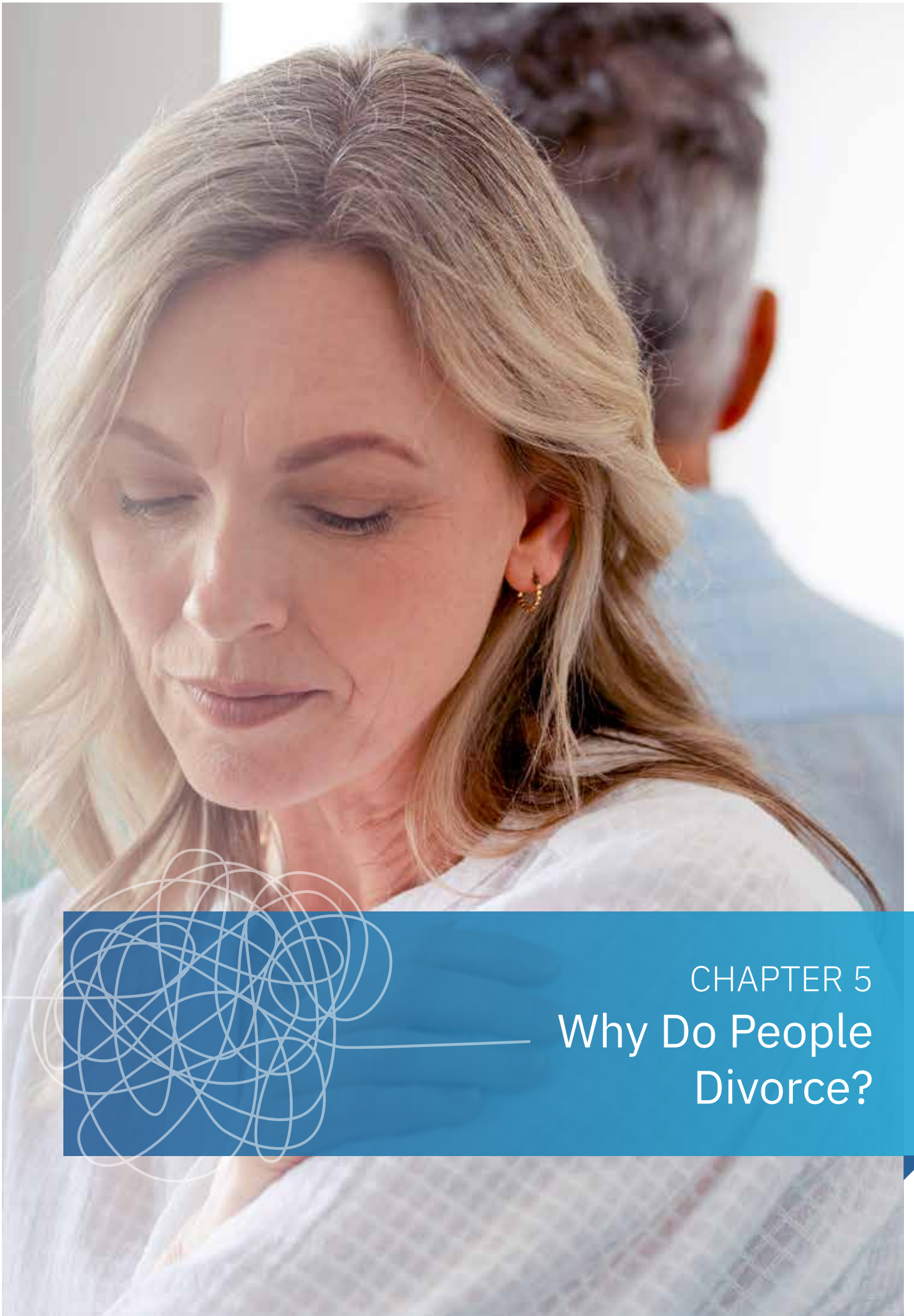
The stance of the Roman Catholic Church remains the same. In 2021, the Vatican stated that it does not intend to change its stance on matrimonial blessings for same-sex unions, as God ‘does not and cannot bless sin’.<sup>16</sup> Four of the seven Manly players who opposed the Pride jersey cited religious beliefs.<sup>17</sup>

## Legal Position

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While the *Marriage Amendment (Definition and Religious Freedoms) Act 2017* (Cth) legalised marriage between same-sex couples, this does not necessarily mean that couples can expect to marry under the stained-glass of their local chapel. Religious ministers, celebrants, and other bodies may refuse to solemnise or facilitate same-sex marriages on the grounds of the doctrine of their faith.<sup>18</sup> They may not refuse solely on the grounds of conscientious objections – their refusal must have a religious basis. Outside of the exemptions for religious entities, an objection to providing services based on sexual orientation or gender would fall under the purview of the *Sex Discrimination Act 1984* (Cth).<sup>19</sup>





CHAPTER 5  
Why Do People  
Divorce?

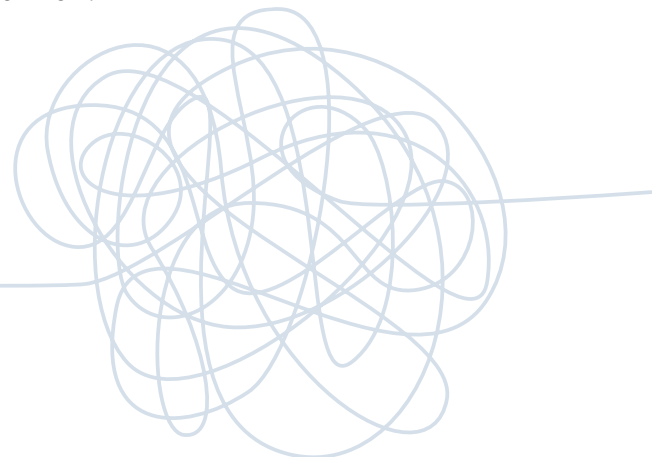


What causes a legal relationship to break down?

Everyone reading this report will know someone who has been in a de facto relationship or a marriage which has dissolved. They may have confided in you as their friend or relative. You may have heard rumours. It may have made the press. The reality is the decision, whether unilateral or mutual, to dissolve a relationship is so personal, so subjective, that to attribute a predominant cause to an individual circumstance and then extrapolate it to the broader society is a senseless exercise.

That said, a number of studies undertaken in Australia and abroad provide insights into this often-debated question. One such study was undertaken by the Australian Government's Australian Institute of Family Studies. Titled, 'Towards Understanding the Reasons for Divorce' (Understanding Divorce Report), the data presented in this paper is drawn from the Australian Divorce Transitions Project, a random national telephone survey of 650 divorced Australians, conducted by the Australian Institute of Family Studies in late 1997.<sup>1</sup>

This report offers many valuable insights on the issues and reasons behind divorce in Australia. While it is accepted that study was undertaken 26 years ago, and society has shifted significantly since then, as lawyers addressing these issues with clients, we find that these reasons are as prevalent now as they were then.



## Attributes of a healthy relationship

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Before we explore the reasons for divorce perhaps, we should start on a more positive subject. What makes a good marriage?

Studies of long-lasting marriages identify the following attributes of healthy couples:<sup>2</sup>

1. a sense of respect and feeling appreciated;
2. trust and fidelity;
3. good sexual relations;
4. good communication;
5. shared values;
6. cooperation and mutual support;
7. enjoyment of shared time;
8. a sense of spirituality; and
9. the ability to be flexible when confronted with transitions and changes.

## The Reasons for Divorce

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There are generally three categories of reasons for divorce. These are:

1. affective reasons
2. abusive behaviours
3. external pressures;

### AFFECTIVE REASONS

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#### Communication problems

Communication problems can be either a short-hand or a global attempt to verbalise an array of situations connected with emotional erosion in the relationship. These might include a feeling of not being understood, feeling that needs are not being met, the loss of affection and companionship or feeling lonely and unappreciated. These reasons are also likely to be symptoms of problems with deeper psychological or social roots.

### **Incompatibility or drifting apart**

We often hear our clients say things like, 'There was a lack of love.' Or, 'We just grew apart emotionally.' They also often say, 'We had completely different ideas on our way of life and the way we lived.' And, 'We changed and grew apart.'

All of these comments are really just different ways of expressing a basic incompatibility or the gradual growing apart that can happen with some couples over time.

### **Infidelity**

Researchers in the Understanding Divorce Report found that infidelity was perceived as the main provocation for divorce by 20% of both men and women.<sup>3</sup>

### **Alcohol and drug abuse**

In the Australian Divorce Transition Project, 11% of women and 3% of men reported alcohol or drug abuse as the main reason for divorce.<sup>4</sup>

## **ABUSIVE BEHAVIOURS**

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Abusive behaviours encompass physical, verbal and emotional violence to oneself, their partner or their children. Of the 6% of respondents who reported that physical violence was the main reason for marriage breakdown, all but one of the 35 were women. In six of these cases, physical danger to a child was the reason. Verbal and emotional abuse was cited as a main reason by only 2% of respondents, also primarily women.<sup>5</sup>

## **EXTERNAL PRESSURES**

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Factors outside the interpersonal relationship may impinge on the relationship. This may generate stress that could lead to marriage breakdown.

### **Mental and physical health**

Approximately 5% of both men and women reported physical or mental health as the main reason their marriage ended.

### **Financial problems**

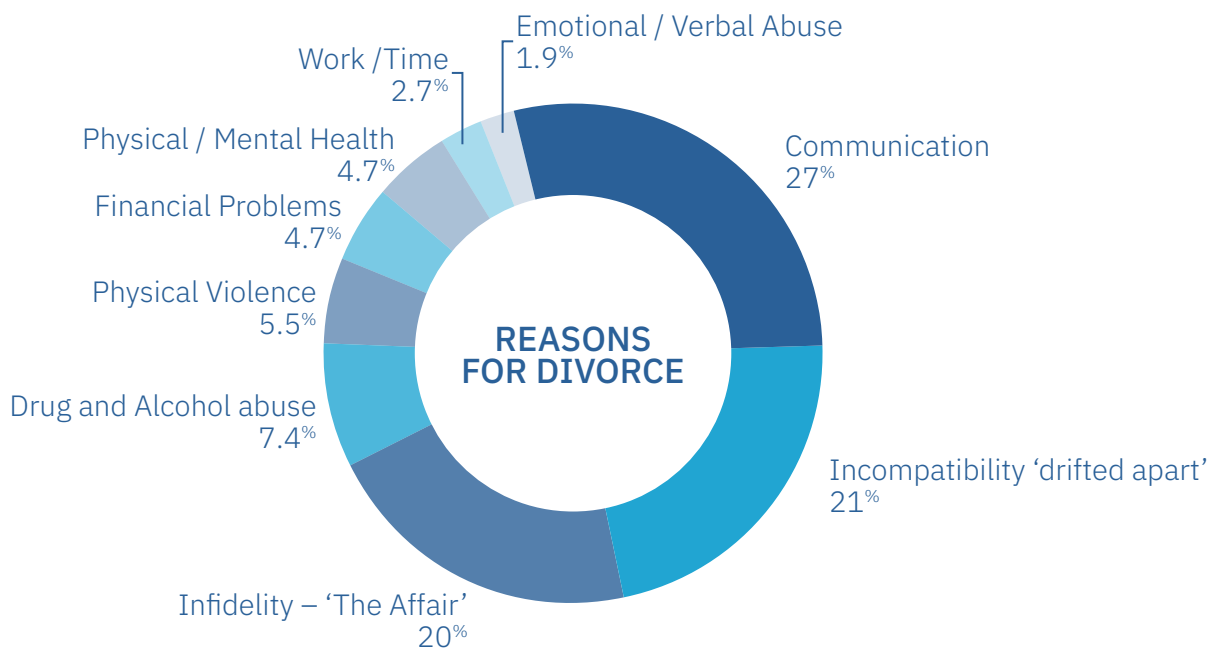
Only 5% of respondents claimed financial problems were the main cause of their marriage ending.

### Work

There has been a lot of recent attention on the increased pressures and hours of work in a competitive economic climate, and the effect on families attempting to balance work and family life. However, work issues and work and family time were cited by only 3% of respondents as the primary reason for divorce.<sup>6</sup>

### In-laws

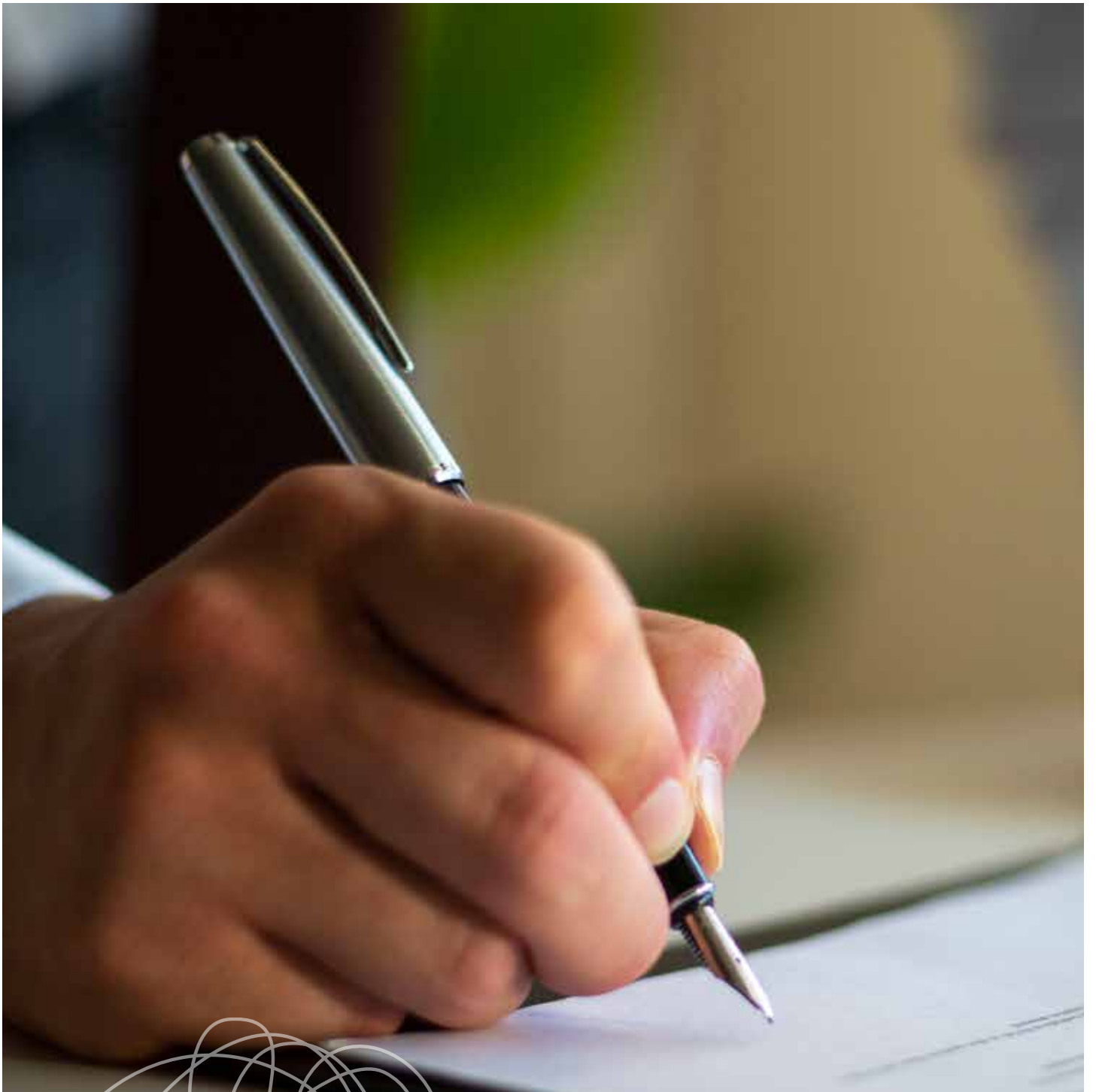
Interference from in-laws as a main reason for divorce was mentioned by few respondents.<sup>7</sup>



## Most Common Reasons for Divorce – AF Legal National Survey

We surveyed our lawyers nationally for the top reasons they are seeing for divorce in 2023:

1. Domestic Violence, coercive control, abuse
2. Infidelity
3. Continual argumentative conflict with spouse
4. Poor communication
5. Financial reasons



CHAPTER 6  
Binding Financial  
Agreements

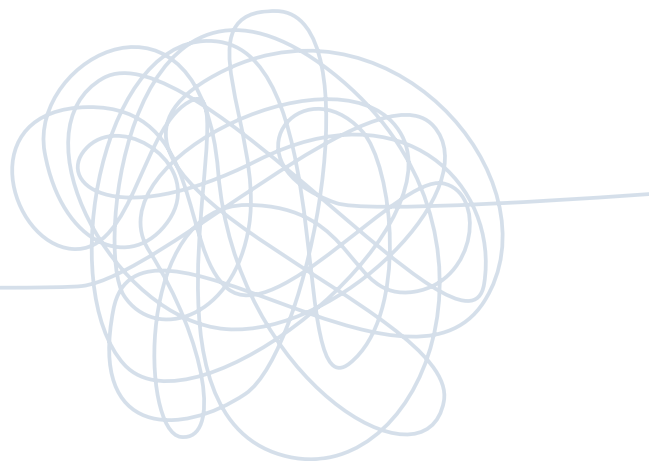
## Background

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*Did you know, some of the first ever documented prenuptial agreements originated in ancient Egypt? Papyri dating back to nearly 3000 years ago shows that a husband promised his wife “1.2 pieces of silver and 36 bags of grain every year for the rest of her life” in the event of a divorce.*

The history of prenups reflects the evolving legal and societal perspectives on marriage, property and individual rights. For thousands of years, and in many countries, women were not permitted to purchase property and therefore a prenuptial agreement ensured a woman could access her husband's property if he died. Today, prenups are increasingly popular and used very differently, to protect sizable wealth, or to isolate assets, should a marriage or de facto relationship break down.

A 'binding financial agreement', or 'financial agreement', is a binding legal agreement prescribing financial arrangements in the event a marriage or de facto relationship breaks down. A financial agreement can be entered into before a marriage or de facto relationship, during the marriage or de facto relationship, and after separation or divorce. Financial Agreements entered into before a marriage or de facto relationship are commonly referred to as a 'prenuptial agreement' but in Australia, legally they are all known as a 'financial agreement'.



## Statistics

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Australian Family Lawyers conducted a survey in August 2023 shedding light on the role of binding financial agreements (BFAs) in Australian relationships both pre and post-separation.

Company data shows that there has been a significant increase in enquiries about Financial Agreements, which have risen by 79% year-on-year. As well as pre-nups there is also rising demand in circumstances to consider in case of a separation.

The survey, which canvasses the experience of family lawyers across the nation, examines various aspects of BFAs to offer a first-hand perspective on their prevalence and their significance in both first and subsequent marriages.

Key findings include:

### **Role of BFAs in lawyers' work:**

- It is a growing area for many specialist family lawyers with all lawyers surveyed currently engaged in BFA work for clients, with some lawyers expressing it constituted 30 – 40% of their overall workload.

### **Pre-separation vs. post-separation BFA enquiries:**

- Both pre and post separation agreements are being requested by clients with pre-separation being more prevalent but post separation becoming more common to allow people to create a mutual and formal agreement around their property settlement, in lieu of the traditional consent court orders

### **BFAs in first and second marriages:**

- When asked about BFAs in the context of a first marriage, 36% of lawyers said they receive such enquiries “rarely”, while 64% receive them “sometimes”.
- In contrast, for second marriages, 50% of respondents stated that they “frequently” receive BFA enquiries in these cases.
- However when it comes to using BFAs as estate planning tools, 67% of lawyers said they still “rarely” receive enquiries of this nature, despite the options this opens up.

### **Primary reasons for seeking a BFA:**

- The most common reason for seeking a BFA according to 54% of lawyers is “to protect property brought into the marriage,” followed by situations where “one individual is of ‘significantly higher net worth’ than their partner” (43%).

## COMMUNITY ATTITUDES

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The trends emerging from this survey emphasise the shifting dynamics of modern relationships and the desire for more certainty in changing times. Many people now consider establishing an agreement as to finances at the outset, especially in subsequent marriages.

Once seen as a bit “Hollywood” there has been a shift in how they are now viewed. It is likely the rise in BFAs can be attributed to factors such as the increasing psychological acceptance of the discussion needed to enter into such an agreement, the ongoing prevalence of wealth being built up by Australians prior to settling down in a relationship and the ever-increasing number of second and subsequent marriages in Australia.

## LEGAL POSITION

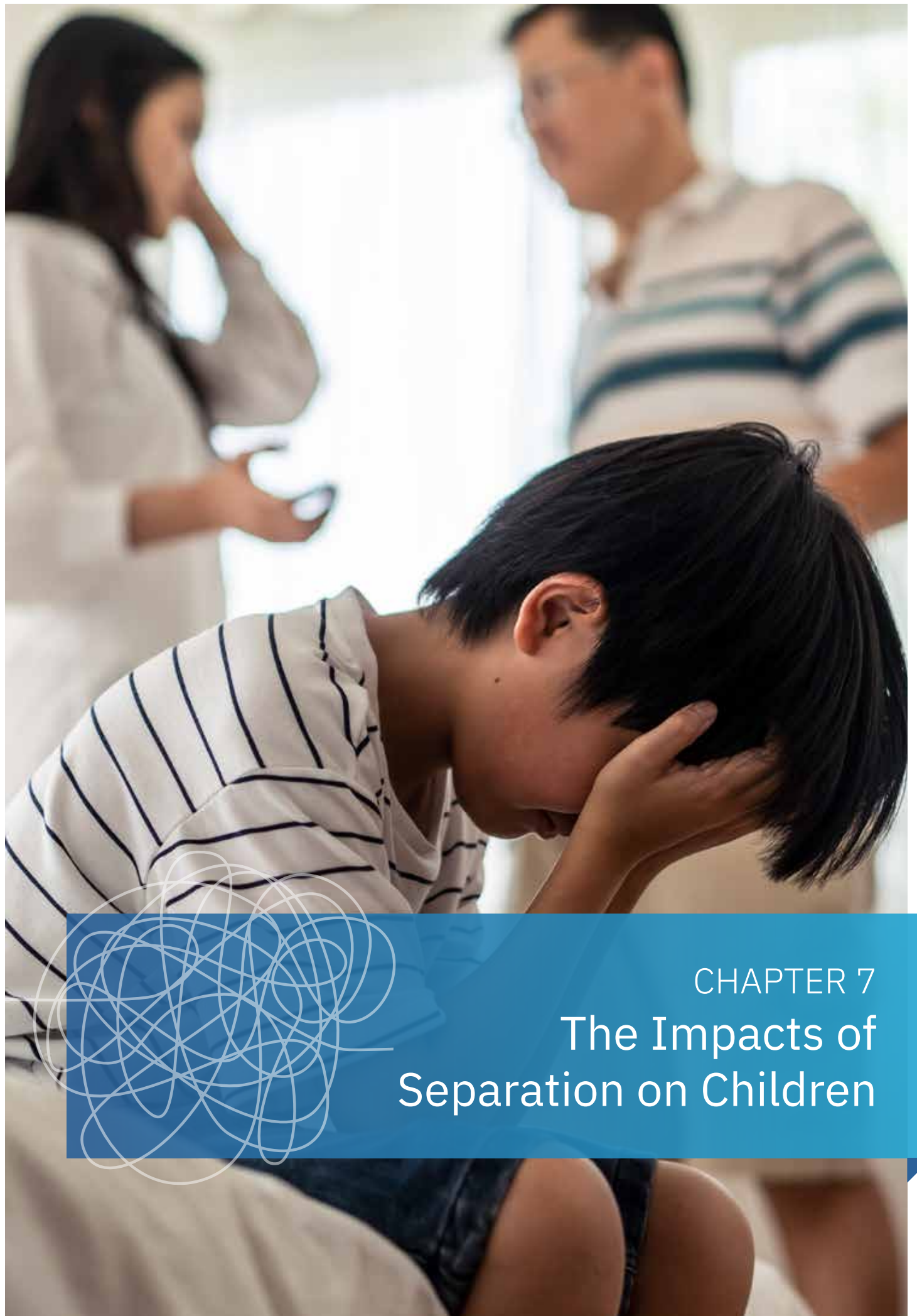
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BFAs are often more complex than the simple agreement many think of them to be and are more intricate than popularly believed. To “stand up in court” a BFA must meet all the technical requirements, be clear and unambiguous in its requirements and each party must have received the necessary independent legal advice.

The survey results underscore the importance of holistic, informed advice when navigating the complexities of relationships in Australia today. The results also show the determination of individuals to make more considered decisions regarding their financial and emotional future. Financial Agreements also create opportunities not yet widely used, to protect intergenerational wealth and assist with succession planning.







CHAPTER 7  
The Impacts of  
Separation on Children



## Background

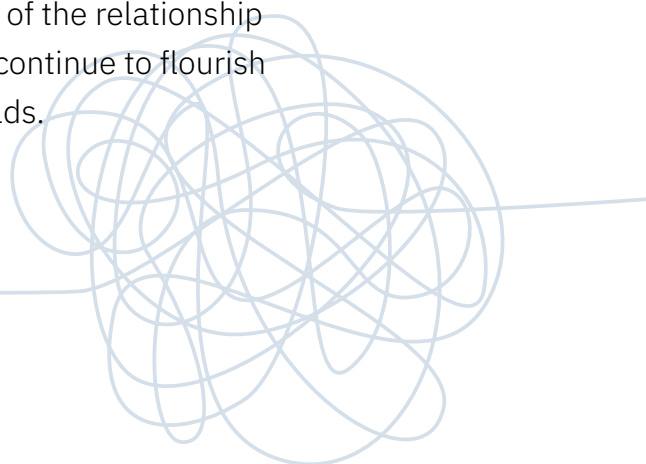
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One day, a pair of arguing women approached a wise king to solve a dispute. Both claimed that they were the true mother of an infant and neither would retract their claim. Wise King Solomon pondered, and then called for his sword to be brought. By cutting the baby in two, each woman might receive an equal half and the matter would be fairly resolved.

Upon hearing the king's judgment, one of the women burst into tears. Rather than see the child die, she begged the king that the other woman be allowed to keep the baby intact. The king decreed that the sobbing woman was the child's true mother, as she was the one whose love preserved its best interests. The biblical tale ends with the child's mother keeping the uninjured infant.<sup>1</sup>

The best interest of the child is enshrined at the heart of the Family Law Act,<sup>2</sup> and is the primary consideration when deciding what arrangements are best for the children after the breakdown of a relationship.<sup>3</sup> But too often we hear of the courtroom as a battleground, and the adversarial nature of the law system can see parents calling for a sword and demanding their half of the child.

The breakdown of a relationship can be a stressful and conflict ridden period for all involved, and for no one more so than for children. The negative psychological effects of divorce on children is an area of study that has been extensively researched, but the family law pathway you choose for resolving post-separation conflict may hold the key to better child outcomes. Effective co-parenting can ensure that your children are sheltered from the conflict of the relationship breakdown and continue to flourish in both households.



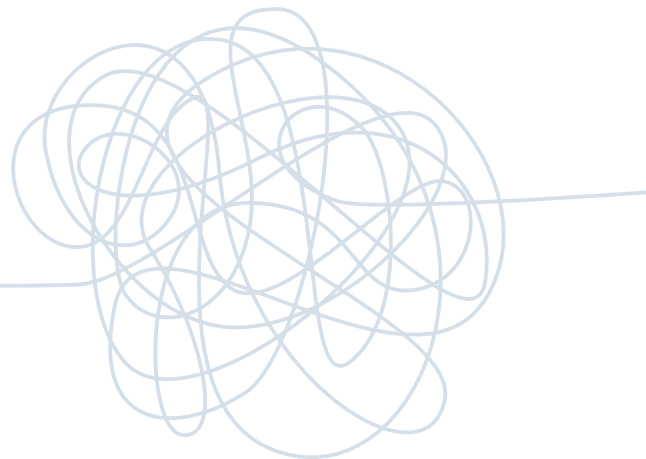
## Statistics

- › In 2021 there were 5.5 million couple families and one million solo parents in Australia.<sup>4</sup>
- › In 2021 more than 1.8 million Australians were divorcees and over 600,000 were separated.<sup>5</sup>
- › Children of divorced parents have twice the rate of severe mental health issues.<sup>7</sup>
- › Children of divorced parents are 14% more likely to attempt suicide in their lifetime.<sup>8</sup>



**Roughly 20% of Australian children will experience parental separation before adulthood.<sup>6</sup>**

A declining Australian divorce rate does not indicate that there are less children impacted by parental separation. Each year in Australia 50,000 to 60,000 children will experience parental separation.<sup>9</sup> The decreasing marriage rates, and the rise of de facto relationships means that parents are increasingly having children outside of marriage. When these partnerships end, they can still require the involvement of the Family Court for parenting orders. *For more information see Chapter 2 – On Married Couples & Divorce, and Chapter 3 – De Facto Relationships.*



## Community Attitudes

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When weighing the heavy choice of whether to end a relationship, it is common for parents to choose to ‘stay together for the kids’. Some of our lawyers observing that “divorce is the new 50” with couples choosing to stay together until their children have finished school. This was not the case a century ago. However, the increased access to divorce in the 1970s resulted in more children experiencing parental separation, and this led to greater academic and societal inspection of separation’s impacts on the child. As the results of research and analysis entered modern media, from academic journals to Hollywood, we became more aware of the effects of relationship dissolution on children.

The outcomes for children of divorced and separated parents can be worse than for children whose parents remain in a relationship. Children from separated families are more likely to have issues with behaviour, education, mental health, and addiction well into adulthood.<sup>10</sup> But divorce or relationship dissolution may not be the cause of worsened outcomes for children, but rather the canary in the mineshaft for family environments with high levels of conflict.<sup>11</sup> Research shows that a quarter of separated partners continue to have significant levels of conflict,<sup>12</sup> and the detrimental impacts of parental conflict on children is an established fact in both separated and non-separated households.<sup>13</sup>

In reality, most children of separated parents adjust well to the separation and do not face significant long term detrimental outcomes when accommodating for the variety of factors that can often coexist in separated households.<sup>14</sup> The statistics that indicate worsened outcomes are influenced by a minority of children that poorly adjust, and fixed variable research found no impact on behaviour and levels of achievement.<sup>15</sup> A Swedish study of 100,000 siblings found the link between divorce and lower academic performance was not causative, but explained by selection. Children of divorced parents were statistically more likely to have negative outcomes, even prior to their parents divorcing.<sup>16</sup>

In Australia, most parents report that after the separation their school aged children did the same as, if not better than, their peers socially, academically, and in most other facets of life.<sup>17</sup> It is not a simple matter of divorce causing significant issues for children. Instead, we should take a holistic approach to the circumstances of relationship dissolution when assessing child outcomes.

## Legal Position

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Most parenting matters can be resolved with the assistance of legal negotiations and mediation and do not need to proceed to the court system. Family Dispute Resolution (FDR) is a non-judicial process that helps parents to resolve their parenting disputes without the need for court intervention.<sup>18</sup> If an agreement is reached by consent, the parenting agreement can be formalised through a Parenting Plan or Consent Orders. Family lawyers can assist with the drafting of these documents.

The court encourages parents to reach agreement where they can without the need to bring the dispute to the court. Except in limited circumstances, such as where there are issues in relation to risk of harm, family violence, or urgency, the court requires parents to have made a 'genuine effort' at Family Dispute Resolution methods before filing an application with the court seeking parenting orders.<sup>19</sup> If a court application is made, the court will aim to make orders that promote a meaningful relationship with both parents if it is safe and in the children's best interests to do so.

There has been a greater emphasis on alternate dispute resolution to encourage parents to reach an agreement outside of court. In fact, the importance of dispute resolution is one of the core principles of the Federal Circuit and Family Court.<sup>20</sup> This saves time and money for the family, manages the resources of the court system, and, most importantly, spares the children from exposure to an adversarial court setting. Today, 97% of separated parents settle custody arrangements outside of the family courts, and 16% of these employ the services of Family Dispute Resolution practitioners and lawyers.<sup>21</sup>

One of the most important factors for mitigating negative experiences for children in the family law system is that the child's voice is heard. To do this they need to be involved in the family law process.

**A 2018 survey released by the Australian Institute of Family Studies on children's experiences in the family court system found that 76% of children and young people wished that their parents had listened to them more regarding parenting arrangements and separation.<sup>22</sup>**

Further, children were more likely to report feeling marginalised from decision making when they were unable to communicate with legal professionals and court personnel in their cases.<sup>23</sup>

If required, the court can appoint an Independent Children's Lawyer (ICL). An ICL is the child's representative whose role is to advocate for the best interest of the child by taking into account all of the relevant factors including their wishes or desires.<sup>24</sup> The court can also canvass the wishes of a child by obtaining a report such as a Child Impact Report or Family Report.

The best outcomes for children generally involve avoiding legal processes and considering the needs and wishes of the children through alternate dispute resolution processes. One of these processes is Child Inclusive Mediation. However, if legal processes are required and a court application is made, ensuring that children feel heard and their wishes considered, may lead to the best outcomes for separated families.





CHAPTER 8  
Adoption

## Background

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*‘There can be no keener revelation of a society’s soul than the way in which it treats its children.’*

Nelson Mandela,  
Former President of South Africa

‘Blood is thicker than water’ is a commonly used, and almost as commonly misunderstood saying. It’s a misleadingly abridged version of an ancient Germanic proverb, which reads in its entirety: ‘the blood of the covenant is thicker than the waters of the womb.’ Correctly interpreted, it means that consciously chosen relationships, not mere genetic ties, are what have lasting strength and integrity. It is the family we choose that matters the most, and families are bound by love, not DNA.

It is this ethos which underlies the age-old practice of adoption. It is unfortunate that in modern times, it is celebrity adoptions that tend to draw the public eye.<sup>1</sup> These adoptions can be pounced upon by tabloid journalism and turned into an entertainment commodity.<sup>2</sup>

The essence of adoption is the benefit to children,<sup>3</sup> not the spectacle, nor the gratification of adults who want to acquire a child.<sup>4</sup>

More broadly, children’s rights have become a central pillar of international co-governance, and of Australian family law. As a signatory of the United Nations Convention on the Rights of the Child (UNCRC), Australia is pledged to protect children from exploitation and abuse.<sup>5</sup> Under the UNCRC, the best interest of the child is a primary consideration in all actions concerning children.<sup>6</sup> This ‘paramountcy principle’ is enshrined in section 60CA of the Family Law Act and lies at the heart of all family law resolutions for children. Further, the court’s consideration as to the ‘best interests’ of the child is located in Section 60CC of the Family Law Act.



## Statistics

- › In Australia there are 4,638,006 children under the age of 14. They made up 18.24% of the Australian population in 2021.<sup>7</sup>



**In 2020-2021 there were 264 adoptions in Australia. This is the lowest number on record.<sup>8</sup>**

- › In 2020-2021 most local adoptions (95%) and intercountry adoptions (71%) were for children under five years of age.<sup>9</sup>
- › For intercountry adoptions in 2020-2021, the median wait time was three years and four months.<sup>10</sup>
- › In 69% of Australian adoptions the parents know the child prior to adoption.<sup>11</sup>
- › 90% of intercountry adoptions in 2020-2021 were from Asia.<sup>12</sup>
- › Taiwan is the primary country of origin for intercountry adoptions and has been for the last decade. 36% of intercountry adoptions in Australia are of Taiwanese children.<sup>13</sup>

In 2020, the Japanese Government funded an artificial matchmaking initiative to combat a problem endemic to developed nations – declining birth rates.<sup>14</sup> With this initiative, they are trying to encourage humans to follow one of their most inbuilt, primal instincts: the sex drive. Japan isn’t the only country facing this challenge. Many nations face the twin problems of decreasing birth rates and an aging population.<sup>15</sup> The latest data from the 2021 census confirms this trend in Australia. Fertility rates have dropped from 1.88 babies per woman in 1990-1991 to 1.62 in 2020-2021.<sup>16</sup> Where children under the age of 14 once made up 30% of the Australian population in 1959, they now make up less than 20%.<sup>17</sup> Adoption rates have seen a similar decline.

Between the start of the millennia and now, adoption numbers have fallen more than 50%. 2020-2021 marked the lowest recorded number of adoptions in Australian history.<sup>18</sup> An ABS report attributes this trend to greater welfare support for single mothers, greater access to abortion, and greater involvement of women in the labour force.<sup>19</sup>

‘There isn’t the stigma that used to exist around being a single mother. There aren’t as many people choosing to place a child into adoption.’ – Renee Carter, Chief Executive of Adopt Change.<sup>20</sup>

INTERCOUNTRY ADOPTION STATISTICS 2020-21.<sup>21</sup>

Country	Total % of Intercountry	Cost Estimate	Median time
Taiwan	35.7%	US\$5,000 – US\$14,000	42 months
South Korea	28.6%	US \$19,500	24 months
Thailand	14.3%	US \$1,000 + THB2,000	60 months

**Still, there are 56,900 children in out-of-home care in Australia, and only 17% will receive a permanent home.<sup>22</sup>**

Adoption can be a difficult and lengthy process, often taking a number of years to finalise.<sup>23</sup>

The number of intercountry adoptions in Australia has declined by 63% over the last 25 years.<sup>24</sup> This decline has been attributed to procedural changes due to the implementation of national treaties for adoption and the better living conditions in countries Australians adopt from.<sup>25</sup>

In 2022, one of the two agencies that Australia partners with in Taiwan, the Child Welfare League Foundation, will be prioritising the adoption of children with special needs. Unless you are willing to adopt a child with special needs, your application will likely not be accepted.<sup>26</sup> The second largest country that Australians adopt from, South Korea, will not be accepting any new applications in 2022.<sup>27</sup> On top of the costs for travel, documentation, and other countries' fees, the adopters can also expect to pay between \$3,000 and \$12,000 in fees to their home state's central authority for intercountry adoption.<sup>28</sup>

## Community Attitudes

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Adopting a child is one of the greatest public goods one can do. It is a way of providing a child with a safe environment and opportunities that would have otherwise been inaccessible.<sup>29</sup> There is also the perception that the adoption system is broken and drawn out, and that kids in the foster system could be troubled or traumatised,<sup>30</sup> negatively impacting their family life.

So, while Australians see adoption as a charitable act worthy of admiration, in a nationally representative survey in 2015, 68% of Australians couldn't see themselves adopting it in the future or stated that they would never consider it.<sup>31</sup>

## Legal Position

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Adopting Australian law differentiates adoptions by type. Broadly, adoptions are classified either as domestic or intercountry. Intercountry adoptions are those of children from countries other than Australia. In these situations, typically the adoptive parents have not had prior contact with the adoptee.<sup>32</sup> Adoptions of children from within Australia, or ‘domestic adoptions’, are divided into two categories. Known adoptions make up 69% of all adoptions.<sup>33</sup> In these cases, the adoptive parents have a pre-existing relationship with the child. ‘Local adoptions’ are the way we refer to the adoption of Australian children who have no prior relationship with the adoptive parents.

Australian states have different laws governing adoption, and different laws regarding the different types of adoptions.<sup>34</sup> However, there are some broad similarities across jurisdictions. All states have a requirement for parental consent prior to adoption, have provisions to dispense with this requirement, and prioritise the rights of the child in alignment with the UNCRC.<sup>35</sup> Additionally, not everyone can adopt in Australia. You will need to meet the suitability criteria for criminal history, applicant health, age, and relationship stability.<sup>36</sup>

The Commonwealth-State Agreement for the Continued Operation of Australia’s Intercountry Adoption Program is the framework that provides for the implementation of the Hague Convention through international and inter-state bilateral adoption agreements.<sup>37</sup> The agreement also establishes the roles of the State and Commonwealth Central Authorities, as defined in Section 111C of the Family Law Act.<sup>38</sup> The agreement acknowledges that the practices and processes in countries that Australians adopt from is outside of Commonwealth control.<sup>39</sup> International agencies’ requirements for prospective adoptive parents do not always align with the modern Australian sensibilities, or Australia’s National Principles in Adoption.<sup>40</sup> For example, adoption agencies in Taiwan and South Korea do not allow Australian same sex couples or de facto couples to adopt.<sup>41</sup> The process of international adoption will vary greatly depending on the adopter’s state legislation, the child’s country of origin, and the adoption agency within that country.

Ultimately, adoptions comprise many benefits to adopters and to children alike. One must bear in mind the best interests of the child being adopted as the primary consideration.



CHAPTER 9  
Domestic Violence



## Background

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There is a small corner in a Camp Hill Nature Reserve that will forever be ‘Hannah’s Place’. A tranquil shelter amongst the greenery in Brisbane’s east, that was dedicated on what would have been Hannah Clarke’s 32nd birthday.

Ailiyah was six years old. Laianah was four. Trey was only three. On the morning of the 19th of February 2020, their father, Rowan Baxter, intercepted the family car armed with a knife and a jerry can. The family never made it to school. He doused the car’s cabin in petrol and burnt Hannah and her children alive.

The murder of Hannah and her family was a horrific tragedy, but sadly not an isolated incident. It sparked a national discourse on what has been labelled an ‘epidemic’ in Australia.<sup>1</sup> Domestic violence is a form of family violence, often called intimate partner violence, that can entail physical, psychological, sexual, financial, cultural, systems, social, animal, and emotional abuse. The Family Law Act defines *family violence* as ‘violent, threatening or other behaviour by a person that coerces or controls a member of the person’s family, or causes the family member to be fearful,’ although different states and territories have their own legislative definitions.<sup>2</sup>

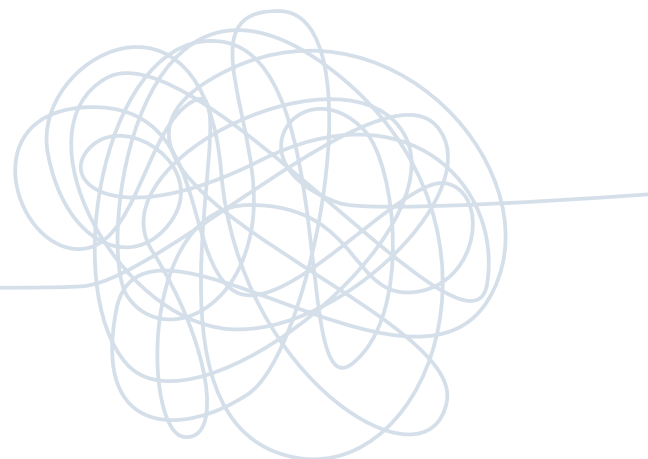
Domestic violence is characterised by controlling behaviour, coercion, and isolation, intended to make victims dependent on their abuser.<sup>3</sup>

**It is estimated that 20% of Australians adults have experienced sexual, physical, or domestic family violence since the age of 15.<sup>4</sup>**

## Statistics

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- › More than a quarter of all homicides were related to family and domestic violence in 2021.<sup>5</sup>
- › In Western Australia 63.2% of assaults were related to family and domestic violence in 2021.<sup>6</sup>
- › There were 11,367 victims of sexual assaults related to family and domestic violence in 2021.<sup>7</sup>
- › In 2019-2020 more than three in 10 assault hospitalisations were for family or domestic violence.<sup>8</sup>
- › In Australia an average of one woman a week and one man a month is killed by a current or former partner.<sup>9</sup>





## Community Attitudes

Fans in blue and fans in maroon gather around TVs and flood stadiums when Origin night comes around. Phil Gould's commentary and a roaring crowd are the soundtrack to this heated rugby league rivalry. For all the product-endorsed highlights and live action replays, the cameras don't capture what happens behind closed doors in New South Wales' homes every Origin night. They don't capture the 40% spike in domestic assaults.<sup>10</sup> This perhaps speaks to the nature of domestic violence that it has a tendency to go unseen and unreported. The clandestine elements of family abuse lead many to mistakenly believe it is a 'private' affair, and contributes to misconceptions about the reality of intimate partner abuse.

Many prevalent misconceptions about domestic violence normalise abusive behaviours and dissuade victims from seeking help. One in five Australians believe that violence is a normal reaction to daily stress (20%), and that sometimes a woman can make a man so angry that he hits her without meaning to (21%).<sup>11</sup> Some even blame the victims of abuse for not leaving, with 32% of Australians believing that those who stay with violent partners are in part responsible for ongoing violence.<sup>12</sup>

In reality, many victims are scared for themselves and for their children, and the perpetrators' tendency to isolate their victims from support networks instils them with a feeling of helplessness. In 2021, over a quarter of women surveyed who had experienced physical or sexual intimate partner violence in the past year said they were not able to get help due to concerns for their safety.<sup>13</sup> Family and domestic violence is the main reason women and children flee their homes. In fact, family and domestic violence victims made up 42% of clients of Specialist Homelessness Services in 2020-2021.<sup>14</sup>

Women are by far the most common victims of domestic violence, and men the most common perpetrators.<sup>15</sup> But victims can be of any age, background, or gender. Many male victims fear ridicule and disbelief if they report their abuse, as well as being misidentified as the abuser. Police often misidentify the primary person in need of protection in domestic violence situations.

While male victims validly fear being mistaken for the abuser, it is a problem more commonly seen in female victims with an internal analysis by Victoria Police of 2020 cases suggesting that females were misidentified at a rate of 12%.<sup>16</sup> Despite a growing awareness in Australia about the domestic violence epidemic, misconceptions persist, and incidents go unreported.

## Legal Position

Rosie Batty, Order of Australia and 2015 Australian of the Year, is an advocate for the prevention of family violence. Her campaign was born from the tragic death of her son Luke, who was stabbed to death by his father after cricket practice in 2014. His death led to a Royal Commission into family violence in Victoria, greater national awareness and support for victims, and innovative reforms to domestic violence legislation across Australia.<sup>17</sup>

Victoria has been at the forefront of family violence reform, driving policy development in other Australian jurisdictions.<sup>18</sup> They introduced the Family Violence Protection Act in 2008, held the first royal commission in Australia on domestic violence, and enacted all 227 of the commission's recommendations.<sup>19</sup> The Victorian government also announced its 10-year plan for addressing family violence in 2017.<sup>20</sup>

Other Australian jurisdictions have their respective legislation for domestic violence. In each of these the variations in terminology and definitions within the acts can broaden or narrow the scope of domestic violence. There is no single domestic violence law in Australia.<sup>21</sup>

### Family Violence Orders

One of the primary methods for protecting persons in domestic violence situations are family violence orders. These orders contain conditions for limiting the behaviour of perpetrators, including restricting contact and proximity to the protected persons, attempting to locate persons, and the possession of firearms.<sup>22</sup> Prior to 2017, domestic violence orders were only recognised in the state that they were issued. However, under the National Domestic Violence Order Scheme they are now automatically registered and enforceable across Australian jurisdictions.<sup>23</sup>

While a domestic violence order (or DVO as they are sometimes called) can often be successful at reducing instances of violence,<sup>24</sup> overall effectiveness and issues of non-compliance remain areas for concern.<sup>25</sup> There were 52,111 DVOs issued in Queensland in 2021-2022. In that same period there were 18,976 defendants convicted of contravening their DVOs.

Further, issues arise when custody orders contradict pre-existing family violence orders. Section 68Q of the Family Law Act states that family violence orders are invalid to the extent where they are inconsistent with orders for parents to spend time with a child. Both Hannah Clarke and Rosie Batty had DVOs against their former partners prior to their respective murders in 2014 and 2020.<sup>28</sup>

The role of domestic violence orders in the family court system has been an area of contention and dispute. In 2021 the Queensland Police Union made a submission to a parliamentary inquiry for recommendations for changes to the Family Law Act. Their submission claimed that domestic violence orders were used strategically in family law disputes. This statement was heavily criticised by both the media and domestic violence advocacy groups.<sup>29</sup> A five-month inquiry into Queensland Police culture and domestic violence concluded in 2022. The Commission found ingrained cultural issues that impacted the QPS' ability to respond to domestic violence.<sup>30</sup>

The claims that domestic violence orders are used maliciously is not new. A 1999 survey of 68 New South Wales magistrates found that 90% believed DVOs were used tactically to deprive a former partner of access to their child.<sup>31</sup> However, the actual prevalence of vexatious DVOs appears to be low and there is a lack of empirical evidence suggesting it occurs with any frequency.<sup>32</sup> Vexatious DVOs are far rarer than the larger problem of violence and abuse going unreported, and the potential danger that media speculation on false allegations pose by encouraging scepticism of abuse victims.

**Help is available. If you are in danger call 000 for emergency services. Call 1800RESPECT for the 24-hour national domestic, family and sexual violence counselling, information, and support services.**



CHAPTER 10  
The Family Law  
System

## Background

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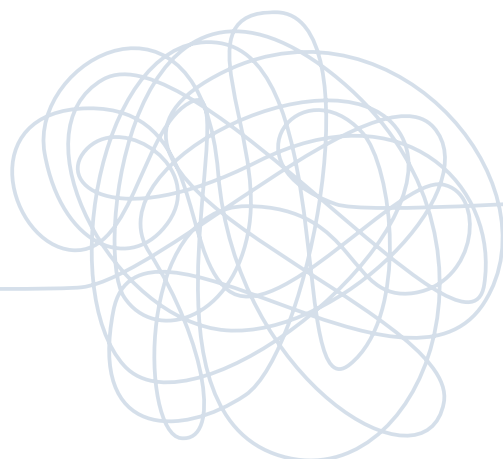
If it's your first time appearing in the family court system, you may not know what to expect. The unfamiliar setting can be intimidating, and the procedures alien. The proper advice and guidance of a family lawyer can help you navigate this foreign environment and resolve your legal dispute.

The Family Court of Australia was established in 1976 and had jurisdiction over all aspects under the Family Law Act, including the breakdown of relationships, children's care arrangements and financial issues such as property settlement and spousal maintenance. In 2021, the Morrison Government introduced legislation that merged the Family Court of Australia with the Federal Circuit Court of Australia effective from 1 September 2021. This newly formed entity is the Federal Circuit

and Family Court of Australia (or the FCFCOA or Family Court). Since the merger, the FCFCOA is the only court which has jurisdiction to deal with purely family law related issues.

**Despite court-based conflicts being perceived as time consuming, the majority of applications to the Family Court (93%) are settled within 12 months.<sup>1</sup>**

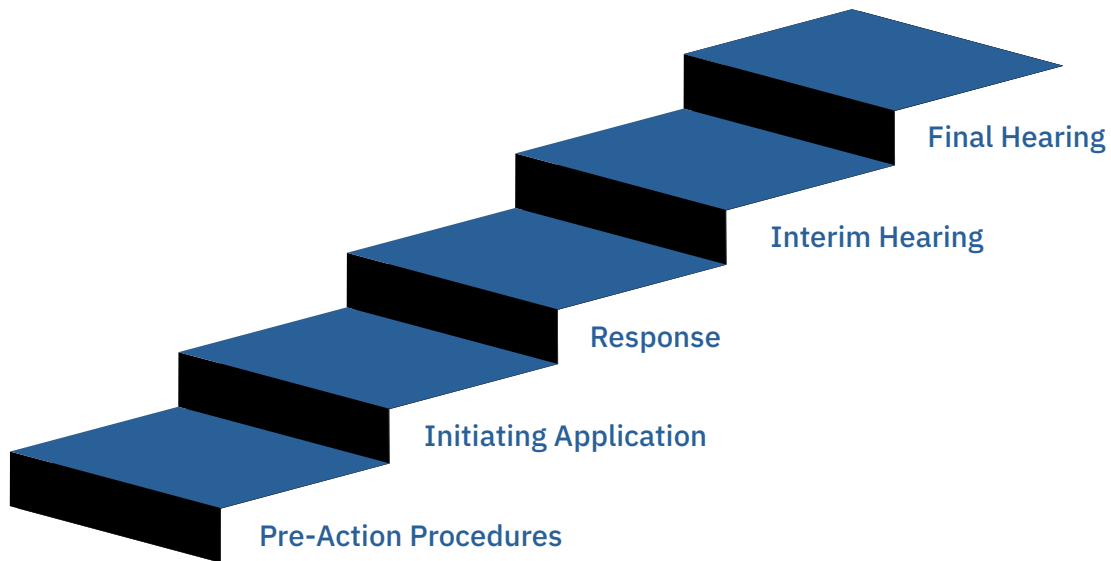
There can be no guaranteed timeline for settling a dispute as it is dependent on the circumstances surrounding each case and their varying degrees of complexity.<sup>2</sup> The Family Court encourages parties to resolve their issues outside of the courtroom, and the majority do so, often through dispute resolution.<sup>3</sup>



## THE FAMILY LAW PROCESS

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At any of these stages parties may decide to settle the matter, and the vast majority of cases do not end up at the final hearing.



### Pre-Action Procedures

Pre-action procedures aim to resolve matters before taking legal action. This can involve drafting correspondence to negotiate a settlement. Family Dispute Resolution, as we discussed previously in this report, is where an accredited impartial third-party acts as a mediator to facilitate an arrangement outside of the courts.

It is mandatory that parties make a ‘genuine effort’ at Family Dispute Resolution before applying to the Family Court for parenting orders.<sup>4</sup> There are a limited set of circumstances which allow this requirement to be dispensed with. Where parties are not able to negotiate freely, a Family Dispute Resolution practitioner may make an assessment that dispute resolution is not appropriate.<sup>5</sup> This may be the case where there is unequal bargaining power, a history of violence, or safety concerns.<sup>6</sup> The Family Court may also dispense with Family Dispute Resolution where the circumstances are urgent,<sup>7</sup> or there has been a contravention of an existing order.<sup>8</sup>

### Initiating Applications

An initiating application is used to commence proceedings to seek final orders, and sometimes also interim orders, from the Family Court. The application should outline the orders sought and the circumstances that form the basis for applying. Once it has been filed and sealed with the court exercising family law jurisdiction, that is, the Family Court in the Eastern States and the Family Court of Western Australia in Western Australia, it should be personally served upon the other party.<sup>10</sup>

### Responding Application

The other party will then file a responding application, either asking the court to dismiss the initiating application, seeking other orders from the court on that matter or another matter, and/or consenting to some of the orders.<sup>11</sup>

At any time if the parties agree to some or all of the orders sought, the parties can have a Minute of Consent Orders prepared and filed.

### Interim Hearing

An interim hearing, or directions hearing, is where the judicial officer (generally a registrar or magistrate) determines urgent or temporary issues and gives interim orders that stand until the final hearing.<sup>12</sup>

### Final Hearing

At the final hearing the judicial officer (generally a judge or magistrate) will hear a matter, including hearing the oral evidence of the parties and their respective witnesses which will inform the final orders.

### Final Orders

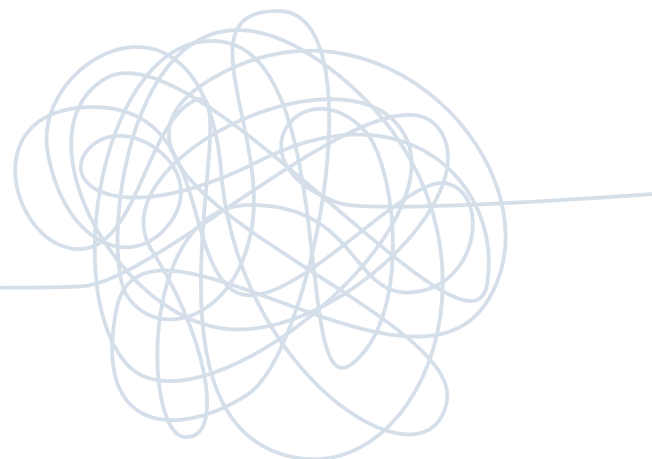
The judge or magistrate will make their findings and give final orders that decide the outcome of the legal dispute. The parties may seek the court's leave to appeal by filing a *Notice to Appeal* with the Appeal Registry within 28 days of orders being made.<sup>13</sup>



## Statistics

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- › In 2020-2021 there were 22,331 applications filed to the Australian family courts.<sup>14</sup>
- › In 2020-2021, 65% of the cases awaiting conclusion were less than 12 months old.<sup>15</sup>
- › Only 3% of parenting agreements are decided in court.<sup>16</sup>
- › 85% of parents using the family courts for parenting disputes reported emotional abuse at the hands of their former partner.<sup>17</sup>
- › 54% of parents using the family courts for parenting disputes reported physical abuse at the hands of their former partner.<sup>18</sup>



## Community Attitudes

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The Family Court deals with the complex issues surrounding some of the nation's most fragmented and dysfunctional domestic situations. It is the setting for custody battles and divorce settlements, domestic violence cases and drug impacted families.

The public perception of the Family Court is naturally coloured by the severe nature of the issues it resolves. Despite this, Australians have confidence in their judicial system and in the courts. The 2020 Australian Survey of Social Attitudes found that Australia's family courts were Australia's second most trusted institution, ahead of the Federal Parliament.<sup>19</sup> In addition, judges are one of the most trusted professions in the nation according to the 60,000 Australians surveyed by the ABC in 2021.<sup>20</sup>

While there is a high level of confidence in our legal system, families who make their parenting arrangements out of court report the highest level of satisfaction.<sup>21</sup>

This is not due to the Court's inability to satisfactorily determine complex family disputes, but rather reflects the serious nature of the issues requiring judicial determination, which typically could not be reconciled through pre-action procedures. For example, compared to parents who used dispute resolution processes, those who used the Family Court more often had a history of physical and emotional abuse at the hands of their former partner.<sup>22</sup>

Dispute resolution reports the highest levels of satisfaction (73.6%) of the family law pathways for parenting arrangements,<sup>23</sup> and is advocated for by the Family Court in resolving children's issues, financial issues and separation issues.<sup>24</sup>

## Legal Position

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As discussed previously, the new merged Family Court was formed in September of 2021. The purpose of this merger was to reduce the timeframe of family court decisions and create a single point of entry for family court matters.<sup>25</sup>

The new court was divided into two divisions. Division 1, which was formerly known as the Family Court of Australia, is a superior court that deals exclusively with family law issues.<sup>26</sup> Division 2, which was previously the Federal Circuit Court of Australia, handles most family matters as well as other general law issues.<sup>27</sup> All family law proceedings begin through Division 2 courts, and can be transferred to Division 1 depending on the complexity of the case and the general importance of the questions the case raises.<sup>28</sup>

Western Australia is the only Australian state to continue to have its own family court. The Family Court of Western Australia handles the same manner of family issues as the Family Court, but stands apart from the federal court.<sup>29</sup>



CHAPTER 11  
The Cost of  
Family Disputes

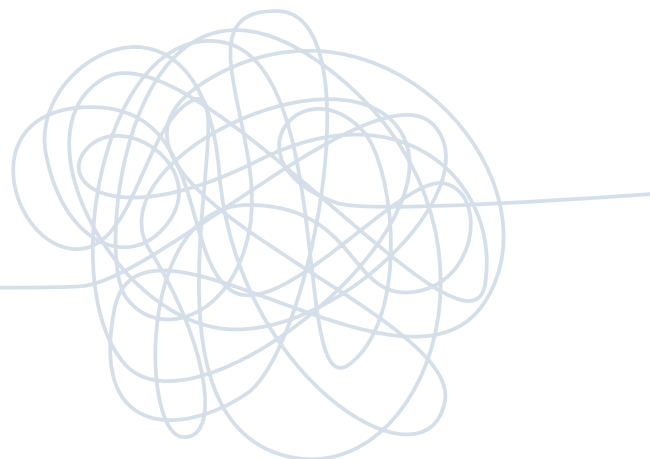


## Background

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In medieval Europe, a party to a legal dispute could prove their innocence by an excruciating ordeal. Defendants would grasp red-hot irons with bare hands, hoping that God would heal the burns to prove their innocence.<sup>1</sup> The legal system has come a long way since then, but for many the emotional strain and financial cost of resolving family disputes can be an ordeal of its own. Thankfully, there are options for resolving family disputes that do not necessitate prohibitive costs and extensive litigation.

Family law disputes can undoubtedly be expensive, but this is dependent on a variety of case-specific factors. Consultation with a family law specialist can help you determine the pathway most appropriate to your situation.



### Statistics and Realities

In our company AF Legal Group the average legal fee per client for our firms is \$7000. As a market sample the average fees will vary between firms depending on the location of the firm, its market position, the complexity of the matter and the demographics of the client. The average family law legal fee sits within the range of about \$6000 to \$15,000. It is not as expensive as most people think or perceive. There are many negative stories about the costs of divorce.

### What drives the costs of a family law dispute is:-

- a. Emotion - when emotions are high so are the legal costs. Lawyers in Family Law will always tell you a client's heart strings can badly damage their purse strings.
- b. Complexity – some disputes involve unique circumstances, with complex matters of law and fact.
- c. Litigation – court battles, despite being in some cases inevitable, are more expensive than a negotiated settlement. In 2018 litigants in the Family Court spent an average of \$110 000 per finalised matter, and \$30 000 per matter in the Federal Circuit Court<sup>2</sup>
- d. Failure to help oneself - quite often much of the costs of matters can be reduced if a client invests time to work on their matter and provide and collect information to avoid additional lawyer's fees.
- e. Monitoring costs - the costs of a dispute are as much a factor to consider in a financial resolution as assets themselves. Costs are often a secondary consideration but should be a factor in all decisions. This is as much the responsibility of the lawyer as it is the client. Billing practices and costs of lawyers is the largest cause for complaints to the Legal Services Commission Queensland.<sup>3</sup>

The majority of statistics do not account for the recent amalgamation of the Federal Court Circuit and the Family Court in September of 2021. The merging of these two courts was intended to reduce wait times for family disputes,<sup>4</sup> which would have the corresponding effect of reducing the legal costs. Legal boots on the ground maintain that delays and costs have not yet changed markedly following the courts merger.

## Community Attitudes

Family Law is uniquely personal. When it comes to your children, your former partner, or your family home, it is inevitable that blood can run hot.<sup>5</sup> Some people can adopt a kamikaze mentality, fighting tooth and nail to deny their former partner any perceived benefit rather than looking for possible concessions and settlement. An effective family lawyer has a moral and professional responsibility to avoid lengthy court battles where possible. These battles rack up emotional and financial costs for a client.

Family lawyers can deal with people at some of the hardest points in their life, when their relationship has broken down, and they need to come to childcare arrangements. The emotional cost can be intergenerational. Children witness their parents' legal dispute and grow up in the aftermath of their parents' courtroom warfare. This is the overriding responsibility of the family lawyer, to minimise this pain and cost through effective and timely resolution.

Naturally, these highly contested legal battles by entrenched people can be prolonged and expensive, but they are exceptions that make up a small portion of family law matters. Extensive litigation is rare, and only 3% of custody agreements are settled in court.<sup>6</sup> The majority of cases are settled before the final hearing.

### Private Lawyers

Family law is a broad term that covers a diverse range of domestic scenarios, and so the cost of engaging a family lawyer is dependent on several factors.

- The costs will likely vary based on:
- The complexity and novelty of your dispute.
- The amount of time and labour required to resolve your dispute.
- The seniority, skill, and expertise of your legal counsel.
- The type of lawyer you require.
- The firm you choose.
- Your lawyer's hourly rate charge in their cost agreement



The amount of your legal costs can also be impacted by the other person's lawyer. If the other person's lawyer dedicates hours to correspondence and legal manoeuvres, and behaves in an aggressive manner, then your lawyer will have to spend time responding. These hours in response lead to mounting legal fees for both parties.

Even within these categories there is a great degree of variability when it comes to costs. The Law Institute of Victoria estimated that the market rate for family lawyers ranges between \$400 to \$800 per hour.<sup>7</sup> In a submission to a parliamentary inquiry into family law it was stated that the daily fee for barristers in one NSW chamber ranged from \$800 to \$20,000.<sup>8</sup>

Regardless of the family lawyer you engage, they have a duty to charge no more than is fair and reasonable,<sup>9</sup> and to disclose the current and predicted costs of resolving your dispute in a costs agreement.<sup>10</sup> This duty is codified in each state's legislation governing legal practitioners.<sup>11</sup> A binding costs agreement is accepted as evidence that the costs are fair and reasonable unless proven otherwise.<sup>12</sup>

You may have seen the slogan 'no-win, no-fee' plastered on billboards and in advertisements for Australian legal firms. These arrangements promise that you will not be charged unless your case is successful and are referred to in legislation as 'conditional costs agreements'.<sup>13</sup> In a family law dispute, both parties' positions can have merit, and the outcome should be what is in the best interests of the child. In these situations, there is not a typical 'win', but rather a compromise. As such 'no-win, no-fee' agreements are unfeasible and not permitted for matters under the Family Law Act.<sup>14</sup>



### Costs Orders

It's not unheard of for separated couples to threaten to take their former partner to court and make them pay for their legal fees. This is not a threat that has basis in the law, and it is a general principle of family law that parties bear their own costs for legal fees.<sup>15</sup> There are exceptions, however, including where a consideration of the case's special circumstances justifies a costs order.<sup>16</sup> Whether parties have a financial imbalance, have received legal aid,<sup>17</sup> have not complied with procedures,<sup>18</sup> or have been wholly unsuccessful and without merit,<sup>19</sup> are some of the circumstances the court should regard when considering whether to make a costs order.<sup>20</sup> Where costs orders are made, there are limitations for the maximum amount recoverable and these typically fall short of the actual legal costs incurred.<sup>21</sup>

### Family Dispute Resolution

It's Family dispute resolution is uniquely suitable for resolving the issues of families in Australia. In custody disputes, parents will likely have to maintain contact to organise parenting arrangements, making a cooperative approach favourable to an adversarial one.<sup>22</sup> Among its many benefits is reduced costs for both parties.<sup>23</sup> One solicitor's estimate to the ABC placed the cost of settling a family matter through mediation at \$20,000 compared to \$100,000 for settling through litigation.<sup>24</sup> Family lawyers have an obligation to advise their clients as early as possible of ways to resolve their dispute without starting legal action.<sup>25</sup> Government-funded Family Relationship Centres can provide affordable family dispute resolution services. For those who earn over \$50,000 a year the first hour is free, and further time is billed at \$30 an hour. If you earn less than this annual income threshold all hours will be free of charge. Sessions over four hours are subject to the centre's fees policy.<sup>26</sup> Legal consultation is advisable for complex family issues prior to mediation to prevent parties from assenting to unfair mediation conditions, and lawyers can draft informal agreements based on the outcomes of the mediation.



### The Courts

The Family Court charges fees for some of the services it provides. These fees can differ depending on which division of the court you are using, and are updated in July of every year. The fees listed below can be found in the *Family Law (Fees) Regulation 2012* (Cth) and are current as of publication.

Document or Service	Family Law Fee
Application for divorce	\$990
Application for decree for nullifying a marriage	\$1,405
Initiating application for parenting	\$385
Filing for leave to appeal	\$1,500
Setting down a hearing date Division 1 court	\$945
Setting down a hearing date Division 2 court	\$695
Daily hearing fee for Division 1 (For every hearing day after the first day)	\$945
Daily hearing fee for Division 2 (For every hearing day after the first day)	\$695
Interim order application	\$130

You may be exempted from paying some of these court fees, or having the fees reduced. You do not have to pay these court fees if you are using legal aid, are the holder of a government concession card, are a minor, imprisoned or detained, or are receiving youth allowance.<sup>27</sup> The court may also exempt you from court fees for financial hardship.<sup>28</sup> However, you cannot get an exemption for fees relating to filing for a divorce, or nullifying your marriage. Instead, these fees may be reduced significantly – down to \$330 for divorce applications and \$465 for nullity.<sup>30</sup>

### Legal Aid

Legal aid is a federally funded service that provides free or low-cost legal assistance to low income and disadvantaged Australians.<sup>31</sup> In 2018-19 legal aid commissions assisted over two million Australians, a fifth of which were family law matters.<sup>32</sup> Whether your case is accepted by legal aid is dependent on a means test, funding guidelines, and the merits of your case.<sup>33</sup> With the commencement of Legal Aid Schemes and Services Approval 2021, parties receiving legal aid no longer pay most court fees. Lawyers have an obligation to give their clients documents prepared by the court with information about legal aid services.<sup>34</sup>

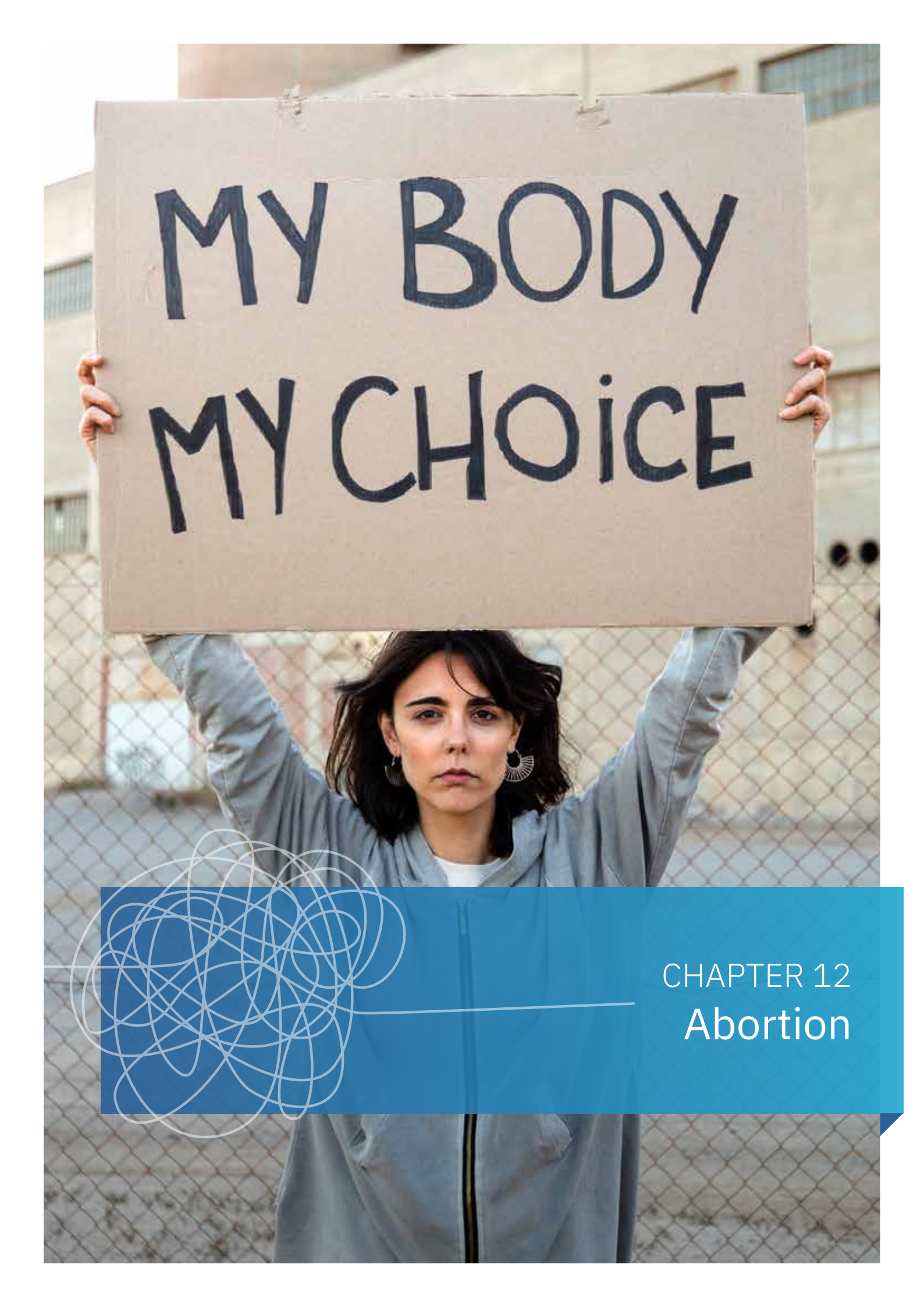
### Other Costs

Aside from the fees accrued by engaging with the legal system, there are also the costs associated with the outcome of the matter. Depending on your case you may have to account for child support, spousal maintenance, or the assets lost by dividing your property with your spouse.



**In 2018-19 legal aid commissions assisted over two million Australians, a fifth of which were family law matters.<sup>32</sup>**



A woman with dark hair and a grey hoodie is holding a large cardboard sign that reads "MY BODY MY CHOICE" in bold, black, hand-painted letters. She is standing in front of a chain-link fence. The sign is held up with both hands, and the text is centered on it. The background shows a building and a fence.

MY BODY  
MY CHOICE

A decorative graphic consisting of a blue square with a white scribble of overlapping lines on the left side. A white horizontal line extends from the right side of the scribble towards the right edge of the page.

CHAPTER 12  
Abortion

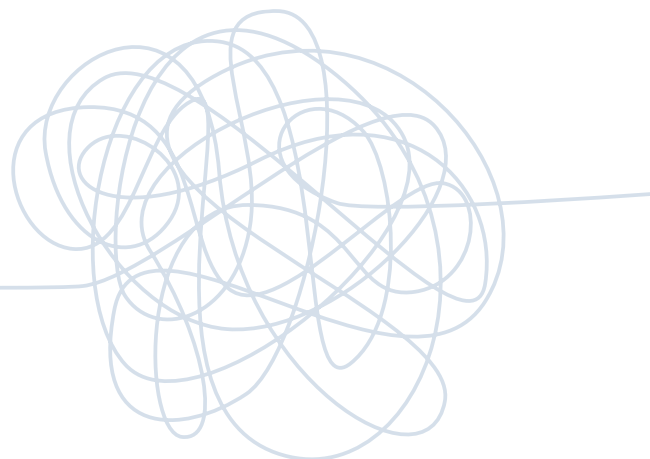
## Background

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It is estimated that 10,000 Melbournians took to the streets in July 2022, chanting slogans like battle cries and brandishing signs. *My Body My Choice. Bans Off Our Bodies. Reproductive Justice Now.*<sup>1</sup> They protested a half century old precedent recently overturned, *Roe v Wade*, marching in solidarity with their sisters in the United States. This case made international headlines and allowed for states across the US to criminalise the reproductive right of abortion.<sup>2</sup>

The legislation may be jurisdictional, but the battle lines are international, skirmishes fought on forums and front pages. The high-octane debate surrounding *Roe v Wade* fuelled Australia's discourse on abortion, and recontextualised Australia's long march to legalisation that has been historically beset by religious and conservative opposition.<sup>3</sup> It is a movement that is ongoing, and the legislative landscape ever evolving. South Australia was the last state in Australia to decriminalise abortion in July of 2022.<sup>4</sup>

Abortion is a medical process that terminates a pregnancy,<sup>5</sup> and it is currently legal in all Australian jurisdictions, with state-based variations on gestational limits and child destruction laws.

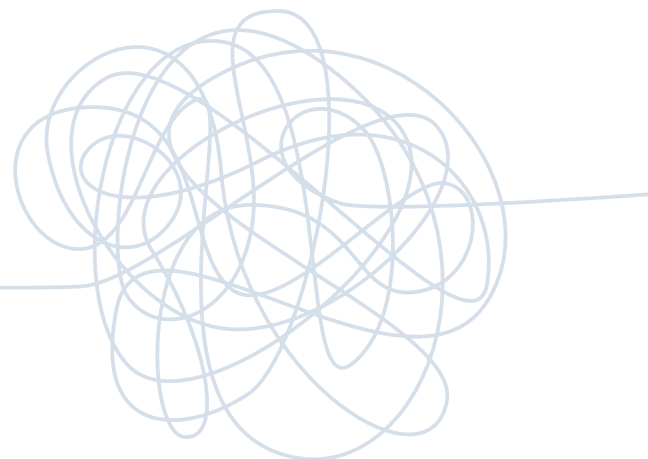




## Statistics

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- › A third of Australian women will have an unintended pregnancy in their lifetime.<sup>6</sup> 30.4% of these will be terminated by abortion.<sup>7</sup>
- › There are an estimated 100,000 abortions in Australia every year.<sup>8</sup>
- › According to MSI Australia, the lowest non-concession price in Australia for a surgical abortion is \$680.<sup>9</sup>
- › According to MSI Australia, the lowest non-concession price in Australia for a medical abortion is \$590.<sup>10</sup>
- › A 2017 study of one Australian abortion clinic found that two thirds of women required financial assistance for the procedure.<sup>11</sup>



There is no national data collection for abortion in Australia.<sup>12</sup> Estimates are often calculated using Medicare item numbers, limited in that they do not account for abortions in private centres,<sup>13</sup> or procedures that share the same item number as induced abortion like miscarriages.<sup>14</sup> Other estimates are extrapolations from the South Australian data, the only state to publish and collect abortion figures.<sup>15</sup> South Australia’s Pregnancy Outcomes report is the source for estimates that one in three woman will have an abortion in their reproductive lifetime.<sup>16</sup>

Another complicating factor for approximation is abortion medication, which was introduced to the Pharmaceutical Benefits Scheme (PBS) in August of 2013.<sup>17</sup> PBS data is informative, but limited, as it does not include medications purchased through the Authorised Prescriber Scheme, private prescriptions,<sup>18</sup> or medications purchased by pharmaceutical companies in one state and then sold in another.<sup>19</sup> Australia was one of the last high-income countries in the world to approve the medication in 2012,<sup>20</sup> and since then the percentage of surgical abortions has dropped drastically.<sup>21</sup>

The difficulty in approximating abortion numbers has meant that a variety of numbers have been presented over the years, varying sources citing 65,000,<sup>22</sup> 83,210,<sup>23</sup> and upwards of 100,000.<sup>24</sup> As the ABS did not collect information on abortion in the 2021 Census, a conclusive annual number will likely remain elusive.



**The difficulty in approximating abortion numbers has meant that a variety of numbers have been presented over the years, varying sources citing 65,000,<sup>22</sup> 83,210,<sup>23</sup> and upwards of 100,000.<sup>24</sup>**

## Community Attitudes

Family The cultural debate on abortion has always been characterised by emotional rhetoric fuelled by opposing moral stances. Traditional religious views on abortion are as critical as they are entrenched, equating the termination of pregnancy with the murder of an infant. Pope Pius IX declared as much in 1869,<sup>25</sup> and Pope Francis said in 2019 that aborting even a fatally ill foetus was like hiring a ‘hitman’.<sup>26</sup>

The intuitively sound connection between faith and anti-abortion sentiment was examined in a 2021 Australian survey of 70,000 respondents.<sup>27</sup> The survey found that an opposition to abortion was linked with high levels of religious observance and conservative beliefs.<sup>28</sup> Some women report fear of being disowned by their religious family members if their abortion were to come out.<sup>29</sup> One of the most extreme expressions of anti-abortion sentiment is the picketing of abortion clinics.<sup>30</sup> However, legislation in all Australian states and territories provides for ‘safe zones’ and prohibits protests in a radius around abortion practices. The liberal perspective opposing anti-abortion sentiment advocates for women’s reproductive rights, body autonomy, and gender equality. It was Julia Gillard who warned in 2013 of abortion again becoming ‘the political plaything of men who think they know better’.<sup>31</sup> Abortion is a gendered issue, and access to abortion provides women with bodily autonomy and the freedom to choose and determine factors that affect their future. Studies on women’s attitudes post-abortion found that the planning and experience restored a sense of control and choice.<sup>32</sup>

**The majority of Australians (76%) are in favour of abortion, especially when the health of the mother is at risk or in cases of rape.<sup>33</sup> Despite this, 65% of Australians in one survey agreed that women seeking an abortion are likely to be harassed.<sup>34</sup>**

In August 2021, Western Australia became the last state in Australia to ban abortion clinic protests, with protests documented months prior to the ban during the height of COVID-19 lockdowns.<sup>35</sup> Today the issue of abortion in Australia remains divisive, with modern sensibilities pitted against religious conservatism.

## Legal Position

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In Australia, abortion laws vary by state. The federal government partly finances the procedure through its healthcare scheme, Medicare, and patients can receive a rebate for their abortion, halving its cost on average.<sup>36</sup>

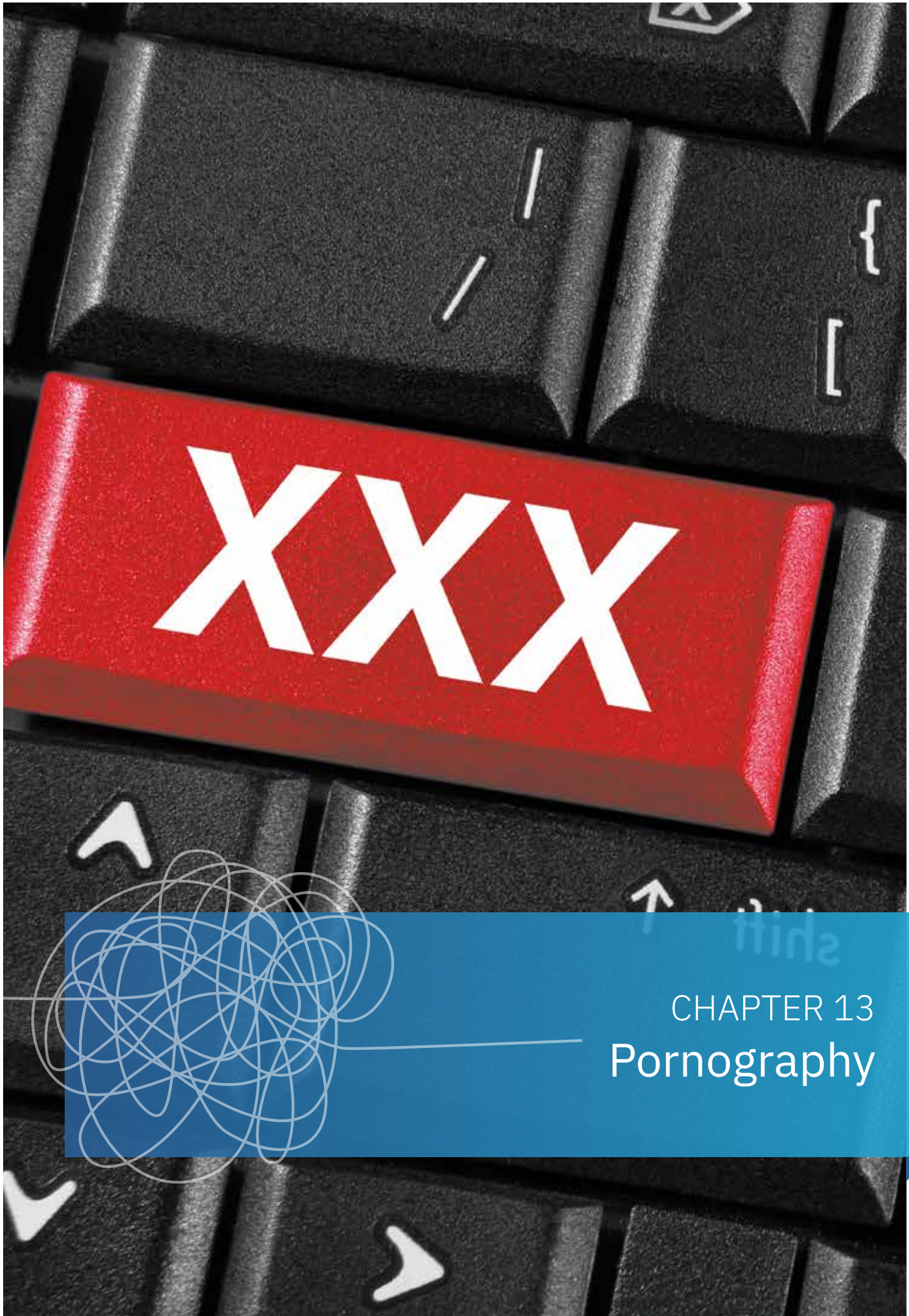
In recent years, many states have modernised their abortion laws, removing it from their criminal codes and amending gestational limits to align with current medical opinion.<sup>37</sup> A gestational limit is a time restriction on when an abortion can be obtained.<sup>38</sup> States have varying criteria for allowing an abortion after the gestational limit, the most common being to ensure the safety of the mother and health of the child, and often at least two doctors must be consulted.<sup>39</sup>

In Queensland, Western Australia, and in the Northern Territory, an abortion near when the pregnancy is due (where the foetus could survive if born) comes under 'child destruction' laws and is a criminal offence. Many states and territories have similar offences, such as in the ACT and WA where 'causing the loss of a foetus',<sup>40</sup> and 'preventing the birth of a live child'<sup>41</sup> are criminal offences.

In some states, such as in New South Wales, it is a criminal offence for an unqualified person to perform an abortion.<sup>42</sup>

Doctors and medical practitioners who have conscientious objections to abortion are not obliged to perform them. In some states and territories, such as ACT, Queensland, and Victoria, they are required to declare their objection and refer the patient on to another service provider who can facilitate the abortion. In Victoria and the Northern Territory, a conscientious objector has a duty to perform an abortion in the event of an emergency where it is required to preserve the mother's life.<sup>43</sup>

Abortion is not considered family law and is not regulated under the Family Law Act. There is however a lesser-known entitlement claimable by a mother (not married to or living with the father of the child) for child-birth maintenance. Laws for abortion in Australia are state based and can vary greatly depending on the state or territory where the abortion is being performed.



CHAPTER 13  
Pornography



## Background

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Rule 34 is an informal online principle that is ‘sacred lore’ to successive generations of internet users.<sup>1</sup> The rule says that for every imaginable topic, there exists a corresponding body of pornography online.<sup>2</sup> Estimates for what portion of the internet is composed of porn vary, from a dubious 30%, to a more credible four to 10%.<sup>3</sup> Whatever the exact share, it is undeniable that internet porn is massively popular.

The overconsumption of pornography is the invasive bindi spreading through Australia’s romantic landscape, its sharp edges felt by husbands, wives, boyfriends, and girlfriends. A growing body of research has attributed the spike in erectile dysfunction in young men to high porn intake.<sup>4</sup>

Relationships suffer from reduced sexual intimacy,<sup>5</sup> and pornography use has been shown to increase the chances of your marriage ending in divorce.<sup>6</sup> After the breakdown of a relationship, we are seeing sexually explicit content being non-consensually shared online to humiliate and intimidate former partners,<sup>7</sup> and Australian legislators have responded by criminalising ‘revenge porn’.<sup>8</sup>

Pornography can be a healthy part of sexual exploration,<sup>9</sup> but like all things, moderation is key. It must be noted that the impact of pornography is by no means a subject with a single decided consensus among the scientific community. It is an area filled with contention, disagreements and contradictory findings, and many studies lack a control group of non-porn watchers. In 2013, a study at the University of Montreal was scrapped as no young males who had not watched porn could be found.<sup>10</sup> Still, a multitude of Australian relationship woes can be laid at the feet of this multi-billion-dollar industry.

## Statistics

› Pornhub is the largest online pornography service in the world and in 2021 an average of 80,032 people visited the site every minute.<sup>11</sup>

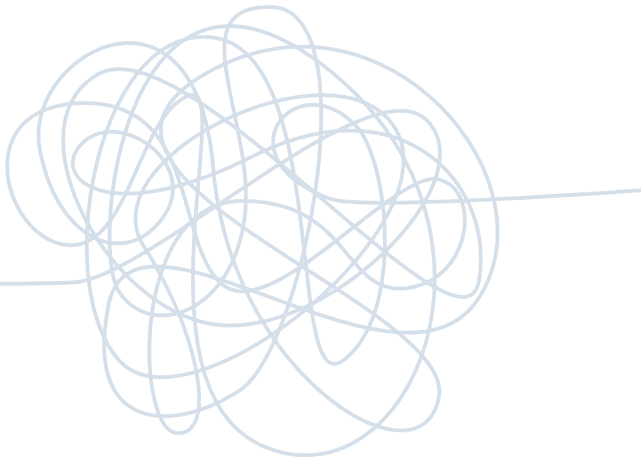


**Australians were the 12th largest users of Pornhub in the world in 2021<sup>12</sup> despite not being in the top 50 largest global populations.<sup>13</sup>**

› In 2021, Australia’s most searched term on Pornhub was ‘hentai’.<sup>14</sup> Hentai is a type of animated Japanese pornography.

› One in five Australian couples battle with intimacy problems triggered by internet porn.<sup>15</sup>

› In a 2017 survey of more than 4,000 Australians by the Royal Melbourne Institute of Technology, one in 10 respondents had experienced sexual content of themselves being shared without their consent.<sup>16</sup>





The statistics show a grim picture for Australian relationships tarred by the erosive influence of excessive pornography. We can see porn users and their loved ones suffer, experiencing less sexual satisfaction in the bedroom.<sup>17</sup> These partners report feelings of physical insecurities due to their spouses' online habits,<sup>18</sup> while habitual porn watchers escalate their consumption with increasingly extreme content in order to achieve arousal.<sup>19</sup>

We are seeing an impact on the quality of relationships, and the quality of marriages. In 2004, Dr Jill Manning presented research to the United States Senate finding that 56% of US divorces involved one partner having an obsessive interest in online pornography.<sup>20</sup> Another US study found that when one party to a marriage begins using pornography, the likelihood of divorce doubles in men and triples in women.<sup>21</sup> Interestingly, if married couples began watching porn together, there was no increase in the likelihood of divorce.<sup>22</sup> So, if you are going to watch porn, watch it with your partner.

While Australia-specific research is thin on the ground, there can be no doubt that the fracturing effect of pornography can likewise be felt by families across our country. The Australian Institute of Family Studies found that pornography was even more commonly cited as an issue in Australian Family Law Disputes than gambling.<sup>23</sup>

Moderate levels of pornography consumption appear relatively harmless,<sup>24</sup> but emerging research has linked excessive use with erectile dysfunction.<sup>25</sup> Online communities have risen seemingly from nowhere, with support groups dedicated to promoting abstinence from pornography to combat erectile dysfunction.<sup>26</sup> The findings of an international online survey examining the link between erectile dysfunction and problematic porn use was released in 2021. The research found that where men under the age of 35 consumed 300 minutes of pornography a week, 30% had erectile dysfunction. Reported erectile dysfunction reduced to 10% for men viewing half an hour weekly.<sup>28</sup> Pornography is responsible for silently eroding Australia's romantic satisfaction.

**In 2004, Dr Jill Manning presented research to the United States Senate finding that 56% of US divorces involved one partner having an obsessive interest in online pornography.<sup>20</sup>**

## Community Attitudes

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The ancient Greeks used pottery to depict explicit acts, and the ancient Sumerians inscribed erotic sonnets on clay tablets. Mere decades after the invention of Gutenberg's printing press, the Pope was denouncing the resultant dissemination of lewd engravings. The telephone, the photograph, film, VCR, DVD – almost every new communicative medium, once invented, was quickly leveraged to produce and transmit explicit material. Technology and pornography have always been intertwined.<sup>29</sup>

But vast online libraries of explicit media form an almost untameable wilderness, with age and consent in many videos nearly impossible to verify. This is the landscape where 'revenge porn' has thrived. Non-consensual content has been the subject of significant media attention domestically and internationally.<sup>30</sup> In the wake of allegations that the site was infested with videos containing children and non-consenting adults,<sup>31</sup> Pornhub removed over 10 million videos, the majority of its pornographic content.<sup>32</sup> This only came after mounting public pressure and the refusal by major credit card companies to facilitate transactions on the site.<sup>33</sup> It now only allows content to be posted by verified accounts, where the consent of participants is confirmed.

In 2017, one in five Australian women between 16 and 45 had been a victim of image-based abuse, or 'revenge porn',<sup>34</sup> and between March and May of 2020 over 1,000 cases were reported to the eSafety Commissioner.<sup>35</sup> These can be sources of trauma, humiliation, and fear for victims. A Victorian report has found that the majority (58%) of incidents before the Magistrates Court occur in the context of family violence.<sup>36</sup> Lawmakers are responding to the rise of revenge porn in Australia with new legislation, but the harm caused by a trusted partner, or a stranger, posting or threatening you with explicit material can be lifelong.

## Legal Position

The *Online Safety Act 2021* (Cth) grants the commissioner greater powers to remove offensive online content. Pornographic material would be considered Class 1 content within the Act, going against the standards of morality and decency, and could be removed by the commissioner. As a result, most Australian porn providers have their servers hosted outside of Australia. Pornographic content classified as X18+ cannot be released Australia wide, with the ACT and NT the only places where their purchase is legal.

Revenge porn is specified as a criminal act in all Australian states and territories besides Tasmania. Tasmania's *Police Offences Act 1935* (Tas) does address the distribution of recordings made in breach of privacy.<sup>37</sup> Revenge porn is also a criminal act at a federal level under section 474.17(1) of the *Criminal Code 1995* (Cth), for using a carriage service to harass, menace, or cause offence. The new powers of the eSafety Commissioner under the *Online Safety Act 2021* only commenced this year. As such, the full effectiveness of this legislation remains to be seen.

In the context of Family Law, the issue of pornography as a risk factor to children occasionally arises. One of the primary considerations when a court is required to determine what is in the best interests of the child is 'the need to protect the child from physical or psychological harm from being subjected to, or exposed to, abuse, neglect and family violence.'<sup>38</sup> It is within the discretion of a judicial officer to determine what constitutes a level of 'unacceptable risk' when determining these matters.

Pornography as a risk factor to children (outside of matters relating to child sex abuse material) is based around the risk of psychological harm to a child if exposed to pornography. By way of example, there are occasions in which a court has made Orders that restrained a party (the father) from accessing pornography while the children were in his care, and for both parents to obtain and utilise anti-porn software on their devices to minimise the risk of children's exposure to pornography.<sup>39</sup>

The basis for such Orders was the father's alleged addiction to pornography and history of conduct, which resulted in the judge identifying a positive need to ensure the children were not exposed to risk of harm by way of viewing such material. It is worth noting that evidence from the clinical psychiatrist engaged in the matter suggested that the father's consumption and attitude towards pornography would not be considered an 'addiction', however, the court still imposed the injunctions upon the father.

It has also been the case that societal pressures and attitudes towards pornography have had impacts on family law cases. In one case, the credit of the father was adversely impacted due to the 'less than truthful' explanation as to his usage of porn and interests in online 'swingers club' chat rooms.<sup>40</sup>

Of note is the judge's comments in determining the matter, citing the evidence of the psychiatrist:

*'It was Dr [H]'s evidence that [the father]'s interest in pornography was in itself insufficient to indicate a risk of the husband offending [i.e., committing sexual abuse], although it was "less likely to exclude the possibility". Dr [H] emphasised that on its own, the fact that an adult is interested in other adults outside the sexual norm, cannot lead to the conclusion that he would be interested in children. It is only if combined with something else as to how the person relates to children that they can be put together. Further, Dr [H] proceeded on the basis that both parties had an interest in pornography and it therefore made little difference as to who had initiated it.'*

Although in this case the use of porn was not in itself considered a risk factor it is clear that it could be indicative of such depending on the case.



## CHAPTER 14 Online Dating

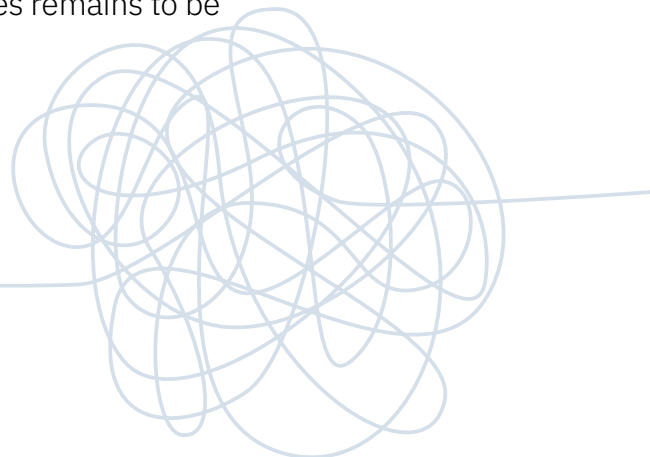
## Background

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Your grandparents likely found love through their work, church, or friends. Perhaps they were childhood sweethearts, or locked eyes across a crowded dance hall and felt the inescapable tug of destiny. But the landscape of romance in Australia has changed. If your children marry, it will likely be to someone they meet online.

You hear it at coffee shops, around dinner tables, and turning on the TV: ‘our technology is pushing us further apart’. However, dating statistics tell a different story. Online courting services like Tinder, Bumble, and E-Harmony, have brought millions of couples together. According to a survey of 54,000 Australians, 30% of relationships formed in 2019 originated online.<sup>1</sup> Not only has online dating outstripped traditional methods of finding love, but research shows that these marriages are equally, if not more, likely to stay together,<sup>2</sup> and have higher reported levels of marital satisfaction.<sup>3</sup>

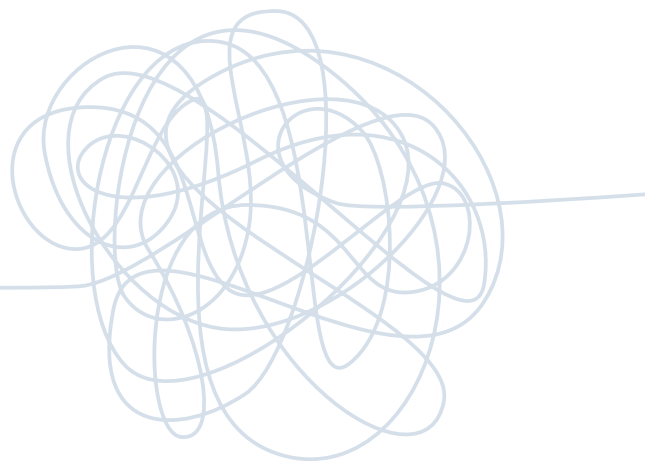
However, this new romantic frontier is not without its dangers. In an environment of perceived anonymity, cases of scamming, harassment, and assault have risen alarmingly.<sup>4</sup> Dating services combat online threats by implementing new safeguards, but the ultimate success of these measures remains to be seen.



## Statistics

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- › Australian adults are now spending half a billion dollars a year to find a partner online, a dramatic increase from \$80.7 million in 2017.<sup>5</sup>
- › A 2020 survey of 15,703 respondents conducted by Triple J found that 50% of Australians aged 18-29 had used a dating app or website.<sup>6</sup>
- › A 2022 survey of nearly 10,000 respondents who had used online dating apps in the last five years found that in that time one in three had been subject to in-person sexual violence facilitated by the dating app.<sup>7</sup>
- › Up to 70% of US same-sex relationships start online.<sup>8</sup>
- › 30% of scam losses reported to the ACCC are romance scams.<sup>9</sup>





## Community Attitudes

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*'...[the] online world provides a fertile landscape in which predators can roam.'*

Judge Higham in the sentencing of Melbourne's 'Tinder Rapist'.<sup>10</sup>

Though online dating was once stigmatised, its rapid adoption has seen it become a normal part of Australian life. Still, negative perceptions of online dating persist,<sup>12</sup> and its implications for cyber security and safety continue to arouse concern.<sup>13</sup>

Catfishing, ghosting, and fake profiles are all unfortunate entries in the modern e-dater's dictionary. Some of the threats facing online users are even more sinister. A 2022 survey for the Australian Institute of Criminology found that three-quarters of online dating app users were subjected to harassing behaviour online, with that figure far greater for LGBTQI+ Australians.<sup>14</sup> These numbers are mirrored by an emerging body of anecdotal reports recounting sexual harassment and violence on dating apps, that have been extensively covered by the Australian media.<sup>15</sup> Experts believe rates of sexual violence online far exceed the reported numbers.<sup>16</sup>

Online dating's rapid growth and accelerating integration into public life requires increased vigilance of these services' dangers.

## Legal Position

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Legislators have responded to Australia's growing need for more robust online protections. In January 2022 the *Online Safety Act 2021* (Cth) commenced, giving users more effective tools to report abusive material and have it removed from online platforms. The Act mandates new industry codes requiring electronic services, including dating apps, to detect and remove inappropriate content.<sup>17</sup> These codes are expected to be finalised later this year.<sup>18</sup>

Each of the states and territories has their own legislation for sexual offences, but the vast majority of incidents don't make it that far. Unfortunately, it is estimated that 85% of sexual assaults escape the attention of the Australian criminal justice system.<sup>19</sup>



## CHAPTER 15 Workplaces

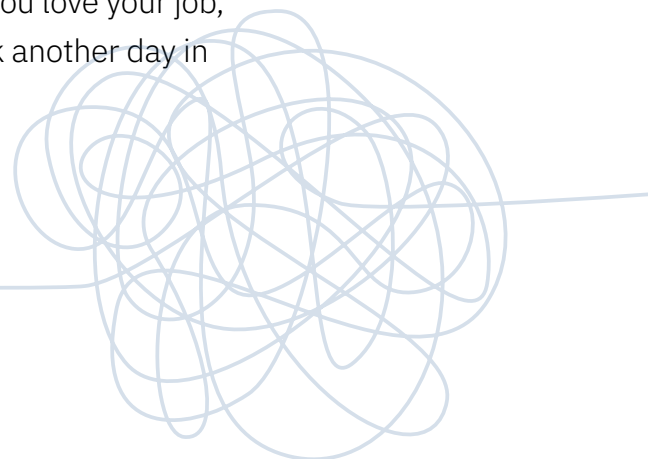
## Background

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“Work-life balance” is a term that has found its way into the phrasebook of the Australian worker in the modern age. The term can be slightly misleading however, in the way that it implies a distinct compartmentalisation of one’s work and life, as though the two are separate entities rather than intertwined components of a fulfilling life.

Your work and family are not separate, but interconnected facets of life that influence each other. A person’s satisfaction or dissatisfaction with either facet will inevitably affect the other. Family stress will impact workplace productivity, and employees bring their work-related stress back home with them. The impact of life events on workplaces has brought the personal life of employees into the scope of employers, and as such the workplace practices in these areas have evolved. Many Australian workplaces cater for employee’s relationships and families, with maternity leave and parental leave policies, work from home options, and childcare incentives. Workplaces are also a place where Australians are meeting romantic partners, a matchmaking avenue that carries significant risks for employees and employers alike.

They say that if you love your job, you’ll never work another day in your life.

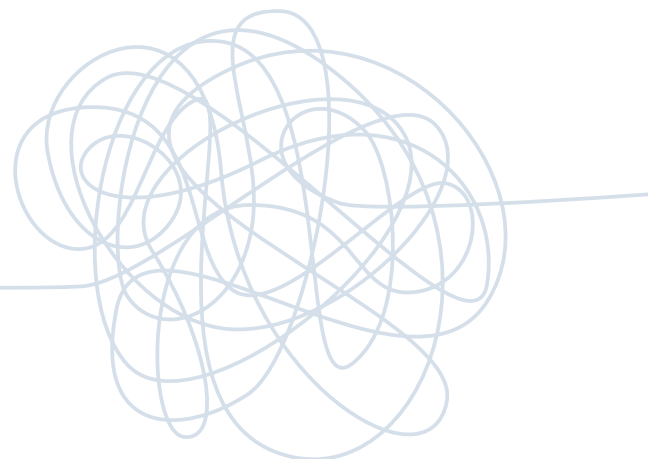


In the nebulous realm of workplace relationships, when the lines between personal and professional blur, and requirements for disclosure and conflicts of interest arise, it is perhaps wise in some respects to keep your love and your job separate.

Workplace relationships are common, but they can be treacherous terrain for management and employees. In a professional setting with hierarchical power imbalances, a workplace romance could potentially cost you your reputation and your career.<sup>3</sup> It may be overdramatic, but not wholly inaccurate, to instead say: If you love at your job, you may never work another day in your life.

It is natural that Australians find love in the workplace. Love and affection require proximity, and many full-time employees spend more waking hours at the office than any other place besides their home.

**It is therefore unsurprising that 13% of Australians meet their partners through work, making it the third most common matchmaker behind online dating and meeting through mutual friends.<sup>4</sup>**

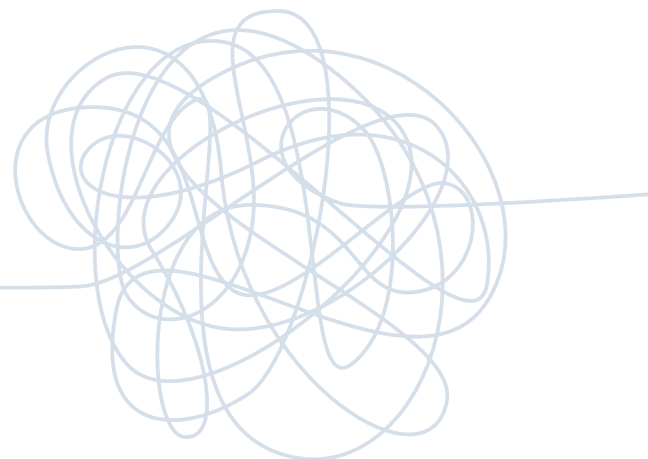




## Statistics

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- › According to Relationships Australia, 40% of people in the 35 to 50 age group met their partner at work.<sup>5</sup>
- › In 2022, 60% of Australian employers surveyed offered access to paid parental leave in addition to the government scheme.
- › 71% of employers surveyed offered Remote working options in 2022. In 2017 only 31% of employers offered Remote working options.<sup>6</sup>
- › 45% of Australians aged 18 to 29 have experienced sexual harassment at work.<sup>7</sup>
- › The cost of workplace sexual harassment to the Australian economy in 2018 has been conservatively estimated as totalling \$3.8 billion.<sup>8</sup>
- › Less than one in five victims (17%) of sexual harassment report the incident.<sup>9</sup> Almost half (45%) of those who reported sexual harassment said that nothing changed in their workplace as a result of the complaint.<sup>10</sup>



## Community Attitudes

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In 2020, two red lines could change everything. A positive Rapid Antigen Test meant that overnight a whole office could be isolating at home for a week. Work From Home (WFH) alternatives were a natural solution to COVID based complications. In a post-COVID era, many workers are reluctant to relinquish the freedoms that WFH provides, while some employers are hesitant to continue the practice.<sup>11</sup> One 2022 Survey of 1000 Australians found that half would rather quit their job than return to the office full-time, and 83% wanted to WFH at least one day per week.<sup>12</sup> WFH, for better or for worse, appears to be a part of Australian life that is here to stay.

Parental leave is time off from work, granted to either a mother or a father for a birth, surrogacy, or adoption.<sup>13</sup> There has been a growing acceptance in Australia that fathers can be the primary carers for their kids, but paternal leave options are not always available to fathers. Fathers can sometimes be labelled as secondary carers in the absence of nationally legislated approach and receive limited parental leave.<sup>14</sup> Generally, companies in Australia are moving towards gender neutral parental leave schemes.<sup>15</sup>

It is fair to say that Australia is in the post #MeToo era. Publicly, affairs in the workforce are frowned upon,<sup>16</sup> and unwanted advances fiercely condemned.<sup>17</sup> A 2018 survey by the Australian Human Rights Commission found that one in three people, and almost two in five women, had experienced sexual harassment in the workplace in the last five years.<sup>18</sup> The #MeToo movement exposed many high-profile instances of harassment, and highlighted the fear and intimidation workers face when coming forward with allegations against their bosses.<sup>19</sup>

Even workplace romances free of coercion or harassment carry 'significant risks'.<sup>20</sup> If a romantic relationship sours, you may still have to maintain a professional relationship and be capable of working alongside your former partner.<sup>21</sup> Romantic relationships have the potential to turn into harassment once the relationship concludes.<sup>22</sup> Furthermore, what may be perceived as an appropriate interaction by one party can be perceived as inappropriate and unwanted by another.<sup>23</sup> In workplace sexual assault and harassment claims produced by #MeToo movement, many offenders contended that their victims consented to advances.<sup>24</sup>

## Legal Position

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In Australia, employees who have worked continuously for 12 months at their workplace are entitled to 12 months of unpaid parental leave under the National Employment Standards provision of the *Fair Work Act 2009*. This is available to both mothers and fathers, who will be able to return to the position they held prior to their leave. 18 weeks of parental leave are available under the *Paid Parental Leave Act 2010*. This leave is paid at the national minimum wage rate to the primary caregiver, normally the mother.<sup>25</sup>

The Australian Human Rights Commission conducted a landmark national inquiry into sexual harassment in Australian workplaces in 2018.<sup>26</sup> The resultant report and its recommendations were the basis for the 2021 reforms to the *Sex Discrimination Act 1984* (Cth).<sup>27</sup>

Sexual harassment is unlawful, and the amendments to the Act expressly address harassment in the context of employment.<sup>28</sup> In the Act it is set out that regard should be given to the circumstances surrounding the alleged harassment, such as power imbalances, the seriousness of the conduct, and whether it was repeated.<sup>29</sup> Many victims of sexual harassment fear that if they speak up, it will negatively affect their careers.<sup>30</sup> So, the Act makes clear that making a complaint about an allegation of sexual harassment cannot be used to threaten or cause detriment to the harassed,<sup>31</sup> and doing so is grounds to sue.<sup>32</sup> Under the amendments to the Act, sexual harassment is also a valid ground for perpetrators to be dismissed.<sup>33</sup>

The explanatory memorandum for the 2021 reforms provides these examples of what sexual harassment in the workplace can look like:

- × Asking intrusive personal questions based on a person's sex.
- × Making inappropriate comments and jokes to a person based on their sex.
- × Displaying images or materials that are sexist, misogynistic, or misandrist.
- × Making sexist, misogynistic, or misandrist remarks about a specific person.
- × Requesting a person to engage in degrading conduct based on their sex.<sup>34</sup>



Workplaces cannot legally put a blanket ban on romantic relationships, and employees are only obliged to follow ‘lawful and reasonable’ directions.<sup>35</sup> Employers’ ‘control’ over their employees’ private lives is limited to where it would affect the operation of their business.<sup>36</sup> However, a contractual duty may be imposed for workplace relationships when a potential conflict of interest arises.<sup>37</sup>

It is possible that a manager could view a worker they are engaged in a relationship with favourably and give them preferential treatment unfairly. For this reason, many workplaces have policies requiring managers to disclose relationships with subordinates.<sup>38</sup> In some cases, failing to do so may constitute a valid ground for dismissal.<sup>39</sup> Whether organisations approve or not, one fact about workplace romances in Australia remains certain: in one form or another, they will persevere.





CHAPTER 16  
Family Law  
Miscellanea

## I. Prostitution

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It's known as 'the world's oldest profession', and for as long as there has been lust and commerce, there has been sex work. In Australia what was once pimps, prostitutes, and shady massage parlours, has grown into a legitimate industry where brothel websites sport blog posts, news columns, and offer discounts on your birthday.

We do not have a precise figure on the number of sex workers in Australia, but a 2014 UN AIDS report estimates there are 20,500 operating in any given year,<sup>1</sup> which aligns with a 2008 estimate of 20,000.<sup>2</sup> Whatever the number, there is a market for sex work here in Australia. 17% of Australian men have paid for sex, and 2% have done so in the last year.<sup>3</sup> Of this 2%, the most common demographic was men aged between 25 and 34.<sup>4</sup> Aside from age, there seems to be 'no social characteristics' distinguishing men who pay for sex from the rest of the male population.<sup>5</sup>

An oblique inquiry into the pricing of brothel services in Brisbane found that the standard hourly rate was \$250-\$260, roughly half of which goes to room hire. The other half goes directly to the sex worker.

**The majority of sex workers have romantic relationships, and most of these partners are aware of the sex work.<sup>6</sup> Australian surveys of sex workers showed that most believe that their occupation negatively impacted their relationships.<sup>7</sup>**

The laws on prostitution vary by state, with differences in the regulation of street work, brothel prostitution, and sex work by private individuals. Sex work legislation is the least prohibitive in New South Wales, Victoria, and the Northern Territory.

### New South Wales

New South Wales legalised prostitution in 1979,<sup>8</sup> and further decriminalised brothel prostitution in 1995.<sup>9</sup> The *Brothels Legislation Amendment Act 2007 (NSW)* gave greater power to councils to take action against brothels that were unlawful.<sup>10</sup> Despite this, a 2009 report in the Daily Telegraph estimated that there were four times as many illegal brothels in Sydney as there are legal ones.<sup>11</sup>

### Northern Territory

In the Northern Territory all forms of sex work were legalised with the *Sex Industry Act 2019*, although workers and businesses must be certified.

## Victoria

Victoria became the third state in Australia to legalise all aspects of sex-work with the *Sex Work Decriminalisation Act 2022*. The reforms allowed for street work, and by December of 2023, sex workers will no longer be required to register.

Some of the changes are dramatic, especially when compared to other jurisdictions where laws are prohibitive. For example, Section 18 of the Sex Work Act was repealed, and condom use is no longer required, instead leaving the choice up to sex workers and their clients.<sup>12</sup> This is a cause of concern given the vulnerable position of some sex workers, especially those that engage in street work. Further, Sections 19 and 20 of the Sex Work Act have also been repealed. This means that sex workers will no longer be able to refuse clients on the grounds that they have a sexually transmitted disease and they will be able to continue working with an STD.<sup>13</sup>

## Other Jurisdictions

Queensland and the ACT allow for brothels to operate with registration and licences but restricts street work.<sup>14</sup> Tasmania has legalised self-employed prostitution, but brothels and street prostitution remain illegal. In South Australia and Western Australia operating brothels and street prostitution remain criminal offences, but prostitution itself is not.

## Human Trafficking

Human trafficking is a hidden reality of the Australian sex work trade. The precise number of women trafficked into Australia is unknown, but figures provided in a 2004 Parliamentary inquiry ranged between 300 and 1,000 every year.<sup>15</sup> Most women who are trafficked into Australia become sex workers in the capital cities.<sup>16</sup> Organised crime syndicates are heavily involved in the trafficking of woman for sex work,<sup>17</sup> and Australia is one of the primary destinations for trafficked women from Asian countries like South Korea, Thailand, and China.<sup>18</sup>

The legislative changes on prostitution and sex-work in some Australian states has reduced trafficked sex workers in the sex industry.<sup>19</sup> Where once sexual exploitation accounted for 100% of all reports to the Support for Trafficked People Program in 2012, this fell to 30% in 2019.<sup>20</sup> Decriminalisation and greater visa access for migrant sex-workers has led to this substantial decrease.<sup>21</sup> Although the number is declining, sex workers are still trafficked into Australia and their true number remains indeterminable.

## II. IVF

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*Louise Brown was born on the 25th of July 1978 at Oldham General Hospital. Before she was even a day old, she was famous. British media reportedly paid £325,000 for the first photos of Louise, capturing what was described as ‘one of the most remarkable medical breakthroughs of the 20th century’.<sup>1</sup>*

Why was she so famous? Louise was the first child conceived through in vitro fertilisation or IVF, the most common form of assisted reproductive technology. In the IVF process an egg is fertilised in vitro – outside of the body – and then transferred to the patient’s womb to induce pregnancy.

Australia has been at the forefront of IVF technology and policy since its development. Less than two years after Louise’s birth, Candice Reed was born in a Melbourne hospital, the first child conceived by IVF to be born in Australia, and the third worldwide.<sup>2</sup> In the last two decades, the percent of IVF births in Australia has quintupled,<sup>3</sup> and now more than 200,000 Australians have been born through assisted reproductive technology.<sup>4</sup>

Australia has one of the highest rates of IVF use in the world.<sup>5</sup> Although treatment is subsidised by Medicare, it remains an expensive procedure – the average out-of-pocket cost of a round of treatment is approximately \$5,000 to \$8,000.<sup>6</sup> Because each round of IVF has a 25 to 30% chance of resulting in a birth, patients may require several rounds of expensive treatment to be successful.<sup>7</sup> Even then there is no guarantee of inducing a pregnancy.

Victoria was the first jurisdiction in the world to enact comprehensive legislation regulating assisted reproductive technology.<sup>8</sup> But today, each of South Australia, Western Australia, Victoria, and New South Wales have specific legislative frameworks regulating the use of assisted reproductive technology.<sup>9</sup> For states that have not enacted state-based legislation, the National Health and Medical Research Council’s Ethical Guidelines apply.<sup>10</sup>

The states' legislation generally regulates counselling requirements and informed consent, and limits IVF treatments to suitable candidates.<sup>11</sup> There are also laws that prohibit sex-selective IVF treatment, except to avoid the incidence of genetic disorders.<sup>12</sup> In some states, a person born of a donated gamete can apply to their state register to access information about their donor parent. These registries exist in Victoria,<sup>13</sup> New South Wales, and Western Australia.<sup>15</sup>

This medical innovation has raised complex ethical and legal questions for prospective parents, medical practitioners, and legislators. The High Court recently considered questions surrounding parentage and IVF, and in one case recognised a sperm donor as a father with the entitlements of parenthood.<sup>16</sup> The use of deceased partner's genetic material for IVF-induced pregnancy has gathered significant social media and media attention in Australia. Following the tragic death of Australian Olympic snowboarder Alex Pullin in 2020, his grieving widow posthumously retrieved his sperm for IVF treatment, and gave birth to his daughter 15 months later.<sup>17</sup> In Queensland this was possible under part 3 of the *Transplantation and Anatomy Act 1979* (Qld), and in 2021 Victorian legislation was amended to allow the use of gametes after death for IVF treatment.<sup>18</sup>

However, federal and state legislators have specifically prohibited the use of IVF for cloning in Australia. Human cloning was outlawed at a federal level by *The Prohibition of Human Cloning Act 2002*, but further legislative restrictions have followed, such as the *Research Involving Human Embryos Regulations 2017* in Queensland.

### III. Surrogacy

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In 2019 a grandmother gave birth to her genetic granddaughter. This miracle of modern science was achieved through in vitro fertilisation, giving her son and his husband the opportunity of parenthood.<sup>1</sup> When a woman carries a pregnancy for a third party with the intention of relinquishing the child after birth, she is a surrogate.<sup>2</sup>

There are two types of surrogacies – traditional surrogacy and gestational surrogacy. Traditional surrogacy uses artificial insemination to fertilise the surrogate's eggs. Gestational surrogacy uses third-party eggs and sperm to create an embryo using IVF, which is then transferred to the uterus of the surrogate.<sup>3</sup> The most common form of surrogacy is gestational, as it is more effective, and reduces the likelihood of surrogates refusing to relinquish genetic offspring.<sup>4</sup>

Pregnancy and childbirth come with many health risks and result in permanent changes to a woman's body. To voluntarily bear, give birth to, and surrender a child for the benefit of another family is an immense act of charity. In all Australian states, surrogacy is only permitted for altruistic reasons, and any kind of financial incentive for being a surrogate is prohibited.<sup>5</sup> This does not extend to payment for expenses related to the pregnancy or birth.<sup>6</sup> Even where surrogacy is not commercial, the cost of surrogacy can still be prohibitive for many couples. Reimbursement for multiple rounds of IVF, travel, medical expenses, and loss of income due to pregnancy can range between \$15,000 and \$100,000.<sup>7</sup>

In some jurisdictions outside of Australia commercial surrogacy is legal, and parents may offer financial compensation to the surrogate mother for carrying the child.<sup>8</sup> New South Wales, Queensland, and the ACT have criminalised international commercial surrogacy arrangements, so parents who travel overseas for these surrogacies may face charges upon returning to their home states.<sup>9</sup> Additionally they may find that they are unable to fulfill the requirements for a transfer of legal parentage.<sup>10</sup>



Surrogacy is a legally complicated process with legislation and requirements differing by state. Surrogacy laws are ultimately inconsistent across Australia, and have been described as ‘fragmented, illogical and dysfunctional’.<sup>11</sup> A medical reason for surrogacy is a requirement in every Australian jurisdiction besides the ACT. In Western Australia, age is specifically excluded as a medical justification for surrogacy. NSW, VIC, QLD, NT, SA, and Tasmania allow for other reasons an intending parent cannot give birth, such as surrogacy for same-sex couples.<sup>12</sup> Western Australia does not allow for same sex couples to pursue surrogacy,<sup>13</sup> and you do not need a reason for surrogacy in the ACT. The age requirements for surrogates are also state dependent, with all states besides the ACT requiring a minimum age of 25 years to be a surrogate.<sup>14</sup>

Unless you are in NSW, South Australia, or Western Australia you cannot advertise for surrogacies, either by offering to be a surrogate or seeking one.<sup>15</sup> New South Wales only allows for unpaid advertisements.<sup>16</sup> There are various other state-requirements, including the age of intending parents, reassignment of parentage, surrogacy agreements, counselling, residency, and for the surrogate to have previously given birth.<sup>17</sup> It is for this reason that across Australia, all parties must receive legal advice before attempting to induce pregnancy in a surrogate.<sup>18</sup>

It is also worth noting that surrogacy agreements are not enforceable,<sup>19</sup> and the surrogate retains full body autonomy during the process. Whilst rare, the surrogate mother may refuse to relinquish the child, or the intended parents could refuse to accept the child. In these cases, the reasonable costs for surrogacy-related expenses may be retrievable by either party, and disputes around care for the child would be resolved through the Family Court process.<sup>20</sup>

*The Surrogacy Act 2022 (NT)* commenced in May of this year, making the Northern Territory the last Australian jurisdiction to pass laws on surrogacy.

## IV. Race & Religion

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Australia's family law system has evolved over time in response to social, cultural, ideological and economic movements. Compared with even 50 years ago, there have been significant legislative reforms that mirror our evolving understanding of family.

The majority of Australia's population growth is driven through immigration from nearly every country around world. A total of 48.2% of Australians had a parent who was born overseas.<sup>1</sup> The practices, laws and customs that regulate family issues around the world often vary greatly from the Australian Family Law System, and new arrivals who need to access family law are often not aware of the differences.

In India there are separate pieces of legislation that govern divorce based on an individual's faith. *The India Divorce Act (1869)* applies for Christians, while the *Hindu Marriage Act (1955)* covers Hindu's Buddhists, Sikhs and Jains.<sup>2</sup> Section 11 of the *Hindu Marriage Act* outlines the grounds for divorce, all of which require fault of one or both parties.<sup>3</sup> This is in contrast with Australia where there only requirement for divorce is the irrevocable breakdown of a marriage as evidenced by 12 months of separation, and where religion and state are kept separate (See Chapter 3 for more information on no fault divorce). Despite being a historically Christian nation, Australian law is secular, with section 116 of the constitution prohibiting the formation of a state church.<sup>4</sup> When several key structural elements like language, religion, the rights afforded women and minorities or the legal system differ between a country of origin and migration, the cultural gap is larger, and culture shock more likely.<sup>5</sup> Coming from a country that has different expectations and laws for acceptable behaviour for families is not a defence for contravening Australian law. The rule of law is a key feature of the Australian legal system, and means that the law is applied equally, irrespective of the customs that dictated marriage, divorce, and de facto relationship in one's previous country of residence.

In nations where religious leaders have significant political sway, doctrine can influence legislation. For example, it was the Vatican who outlawed the marriage of first cousins in Europe, and they have had a significant voice in the same sex marriage debate across the globe. In some parts of the world today, religious doctrine is enshrined in law. Even where the government does not give legal enforcement to religious rules, the church may not acknowledge the decision of a court in matters of marriage and divorce. Even if one can get a legally binding divorce, an annulment may also be required for the dissolution of the marriage to be recognized by their religious institution.

Religion is an important force in the lives of many Australians; however, Australia is a secular country and its legal framework regarding families stands apart from religion.

### **Aboriginal and Torres Strait Islanders**

While the law is carefully structured to be “nondiscriminatory” in order to ensure that the law is “blind” to race and “religion” generally, the Family Law Act has been amended and “augmented” to enable the law and the Courts’ processes to have special regard to the needs of our indigenous population in particular with respect to the determination of parenting cases. This development should be seen as parliaments response to the experience of displacement of indigenous children identified as the “stolen generation” and justified the consideration of indigenous children’s needs to maintain connection with culture and place and extended family as a special case.

There are specific provisions in the section which describes the matters to be taken into account when making decisions about what is in the best interests of the children being s66C (h) which provides that the Court must take in:

- “(h) if the child is an Aboriginal child or a Torres Strait Islander child:
  - i. the child’s right to enjoy his or her Aboriginal or Torres Strait Islander culture (including the right to enjoy that culture with other people who share that culture); and
  - ii. the likely impact any proposed parenting order under this Part will have on that right;”

And further at s66C (6) which provides:

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

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

### Language/Interpreter services

In addition, the Court takes care in its procedures to ensure that clients using the Courts have access to qualified interpreter/translation services.

### Religious Divorces

As stated above a divorce pursuant to the Family Law Act may not be adequate to satisfy a particular religion’s requirements for a divorce. It will be effective as a “state Order” for divorce but parties may still have to proceed through their religious ceremonies provided by their religion for that divorce to be recognised by their faith communities.

The family court determined in *Idelsohn and Idelsohn* [2017] FamCA 398 that it must refuse an application of a party seeking an order from the court seeking to compel another person to enter into or agree to a religious divorce against their will. It could only hear and determine the secular and statutory divorce and would leave the parties to their own judgment as to what steps they would take for a religious divorce ceremony or procedure. In that case the husband sought an order that would force the wife do all things necessary to grant the husband a “Gett” a Jewish religious divorce.



The court decided, if it were to make that order, that as the Gett would be obtained by “duress” in such circumstances and the Jewish religious law provides that the Gett is void if obtained by duress, it would be futile to make the order. The court ruled that the limit of its power would be to require the wife to submit herself to the Rabbinical Court but could not compel her as to what decisions or participation she would be required to do once in the Rabbinical Court process or ceremony.

S116 of the Australian constitution provides that the commonwealth government cannot make laws imposing any religious observance or prohibiting the free observance of any religious practice.

Similarly, it follows that the court cannot make an order to compel a person to grant a “Talaq” in the Islamic faith for essentially the same reasons as set out in the case of Idelsohn.

The court through its processes tries its best to avoid situations where the granting of a religious divorce is used as a “bargaining chip” in the negotiation of property and parenting matters.



## CHAPTER 17

# Overall Trends





## The Key Trends

Unlike relationships the focus of bodies such as 'Relationships Australia'- that exist between friends, family members, neighbours, work colleagues etc this report deals only with 'legal relationships'. That is a relationship which involves legal obligations recognised at law.

The combination of AFL's exposure to legal situations involving relationships, coupled with the empirical data derived from the census, and our secondary research leads to these conclusions:-

**TIMES ARE TOUGH** – There is no harder time in the history of Australian Society to sustain and maintain a legal relationship. There are so many influences, changes and environmental factors that influence how people think and act in legal relationships. These did not exist before and they make it very hard. There is no time in history that could compare to the pressures faced to maintain a lifelong marriage than today.

**DIVORCE** – and dissolution will remain omnipresent in our society. It is likely to continue to increase.

**THE NORM** – Divorce and separation are now a societal norm with the decision to dissolve a legal relationship. There is less stigma. In many cases divorce can be liberating.

**GOD WILL LOOK DOWN ON ME** – with a different religious landscape and many marriages conducted now by celebrants rather than pastors, there is less focus on marriage as a faith based ceremony but a symbolic event to confirm a relationship contract.

**COST AND EASE** – Divorce is as easy as following a process. It is disagreement and emotion that creates complexity, stress and cost.

**A TOUCH OF HOLLYWOOD** – More and more people are enquiring about 'Pre-Nups' - prenuptial agreements or in legal terms a Binding Financial Agreement. These apply to married couples and de facto relationship to protect assets. You start a relationship on the premises of how to address it when it dissolves. They are becoming more prominent.

**SAME SEX** – Starting from scratch the growth in and acceptance of same sex marriage has been as prolific as it has been admirable.

**MARRIAGE – SAVE THE WEDDING COSTS?** – Marriages are waning. De facto relationships are on the rise and dramatically so. But both carry legal consequences and obligations.

**SAVE YOUR MARRIAGE** – Communication is the most significant factor in sustaining a legal relationship.

**CHILDREN** – Put children first. If you do and manage a relationship dissolution your kids will suffer no long-term effects.

**I'M LONELY** – If you are lonely look for a partner on-line. It is a new way, and it is very successful. But...do your due diligence.

**I WANT A BABY** – Delay is problematic due to increases in infertility rates; the prohibitive cost of IVF; difficulty in legal adoptions; and surrogacy is a legal minefield. The inability to have children is a relationship pressure.

**DOMESTICE VIOLENCE** – has reached unsatisfactory levels but society is taking positive steps to ameliorate its nefarious impact on victims.

**WOMEN** – the changing role of women in our society has seen females gain greater independence, strength, autonomy, and power in relationships. This balancing of family roles, education and financial contributions between Australian men and women has seen parity in decisions involving acceptable conventions and behaviours in relationships.

## Looking to the Future – AF Legal National Survey 2023

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We surveyed our lawyers nationally on the changing nature of legal relationships, innovations and factors they see shaping the future of family law:

1. Blended families
2. Parents of transgender/gender diverse children
3. Parents of same gender
4. Early inheritance
5. Artificial intelligence tools/apps
6. Crypto and digital currency
7. Increase in financial control/financial abuse
8. Separation under one roof, due to increasing financial pressure.



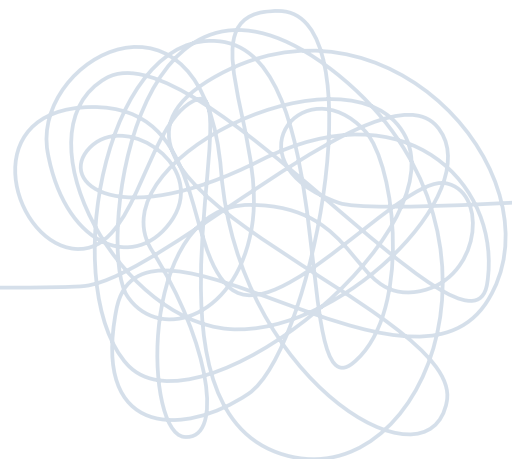
CHAPTER 18  
Acknowledgments

I am very proud to acknowledge the work that has gone into the authorship and production of this ‘first of kind’ legal report into Family Law relationships in Australia. At AF Legal Group Ltd we have some of the best and most experienced talent that has shaped Family Law in our country as well as helping so many Australians and others in need.

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Firstly, and most importantly I pay tribute to Michael Sheahan whose wordsmithing, research and dedication to this task has been a highlight. As a young and aspiring lawyer Michael has been the backbone of this document and much of its substance is his doing. He is a star of the future.

This was the idea of our Legal Practice Director Grant Dearlove. The world of family law is so fascinating as it is real. People are intrigued by what we as lawyers see in our day-to-day roles. Grant’s idea of sharing our insights is a valuable contribution to many who read this and educate themselves and others of the experiences of family lawyers.



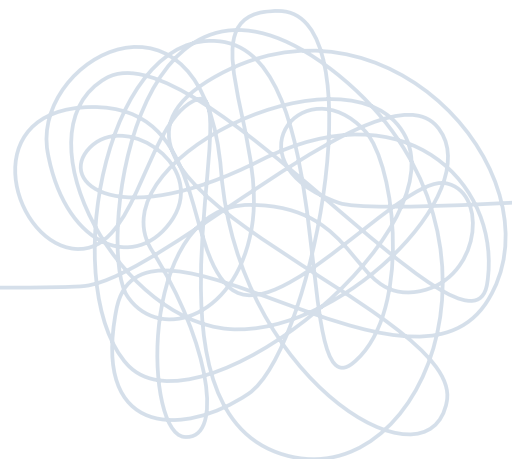
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I thank everyone and commend this to all readers.



**Stace Boardman**  
**Chief Executive Officer**



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## Chapter 15

### Family Law Miscellanea

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