



OFFICE OF THE GOVERNOR
VICTORIA

**MAURICE BLACKBURN ORATION -
THE CHANGING FACE OF AUSTRALIAN FAMILIES**

Tuesday 26 July, 2016

Cr Samantha Ratnam, Mayor of Moreland City Council

Moreland City Councillors,

Ms Nerina Di Lorenzo, Chief Executive Officer of Moreland City Council,

Distinguished guests, ladies and gentlemen

First, I acknowledge the traditional owners of the land on which we are gathering and pay my respects to their elders, past and present, and to any elders with us today.

MAURICE BLACKBURN

It is a sign of the times that, nowadays, many people, when they hear the name “Maurice Blackburn”, think first of the big law firm, rather than the man.

Maurice Blackburn, after all, lived and died well before many of us were born. His law firm though, named for him, was and is a fixture in this State’s legal life and culture.

That reinforces, doesn’t it, that an Oration such as this is a wonderful way to cement a legacy, to have us pause and reflect upon - and celebrate - a good man, a great thinker and a prominent Victorian. Credit to the Coburg City Council, (as it then was), for choosing to name this lecture after him.

Maurice Blackburn was educated at Melbourne Grammar School. He led a life devoted to social justice, trade union rights, civil liberties and international peace, both as a lawyer and as a politician.

As a lawyer, he is remembered for cases that played a key role in establishing workers' rights, including the 40-hour working week and wage equality for indigenous workers.

As a politician, he excelled in both State and Federal politics. Throughout his political career, he played a significant role in labour law, the equality of women, anti-fascism (and, as a teetotaler, in shorter drinking hours!).

He was also an active opponent of overseas conscription. This year in fact marks the centenary of his involvement with the movement that prevented conscription from being enacted in 1916.

He was known, quite simply, as an honest man. If that sounds like an under-statement, I don't think it is. What better accolade could there be, after a long and public life, than to be universally regarded as an honest person? Or, to have your "most remarkable quality", assessed by Sir Robert Menzies, as "indomitable moral courage"?

I know that I cannot equate myself with Maurice Blackburn in any way. But I am happy to realise that, in addition to both attending the University of Melbourne, and practising law, we have in common the privilege of having been trustees of our wonderful National Gallery of Victoria – obviously at different points in history!

CHOOSING A TOPIC FOR THIS ORATION

Thinking about this Oration, in advance, of course I turned my mind to a topic. It is natural, or at least I think it is - I hope it is - to consider speakers who have gone before. It is a partly good idea. Good, to get the tenor of the speech. Less good, for its daunting nature, given the powerful list of previous orators.

But it was inspirational for me, because I saw, in the year 1994, the name of my former Chief Justice in the Family Court of Australia, The Honourable Alastair Nicholson AO RFD QC.

1994 was an auspicious year for him to deliver this Oration. Probably not at all by chance, it coincided with the International Year of the Family.

On a personal note, it was just very shortly before I commenced my appointment as a judge in the Family Court.

I am a great admirer of Alastair Nicholson. I respected and appreciated him as my Chief Justice, as a leader, as someone who nurtured and facilitated others to best contribute their own views and skills, and as someone who devoted his own considerable legal skills and unwavering moral compass to the betterment of families, and family law.

In addition, I respect and applaud his continuing commitment to families in his professional life after the Family Court, in many prominent public roles, including as Chair of the National Centre Against Bullying. Appropriately, he was the recipient of the Human Rights Award at the Fifth World Congress on Family Law and Children's Rights held in Canada in 2009.

And so, I have decided to revisit Alastair Nicholson's Oration – to talk of the changing face of Australian families - because, since he delivered it, I have, through my work, reflected a great deal on the family.

It would be nicely symmetrical if I could underpin my choice of topic by describing to you an obvious link between that 1994 UN theme of the Year of the Family, and this year's UN theme. However, as 2016 is the "Year of the Pulse", (and that is a vegetable pulse, not a human pulse), it's hard to find the link!

May I start with the disclaimer that this is not intended as a scholarly piece. I am not a sociologist, anthropologist or legal academic. Nor am I any longer a lawyer or approaching this Oration with legal research, let alone law reform at its heart. Of course, policy is not for me.

This is more an idiosyncratic contemplation as to some of the changes we have seen in families between 1994, when I was about to start as a judge, and now, within several years of my finishing an 18 year term in that role.

NOW COMPARED TO 20 YEARS AGO: AN OVERVIEW

So when it comes to families, what difference has the last 20 or so years made? The answer is, in summary, a great deal, and not a lot.

So, what is similar?

In 1994, Nicholson described “a changing world”. He spoke of *“high rates of marriage breakdown, increased secularisation, youth homelessness and reports of widespread domestic violence and abuse of children”*.

The same can be said of today.

He spoke of smaller families, longer life expectancy, the emergence of what was then a *“fairly recent phenomenon”* of *“the never empty nest”*, the large numbers of couples who lived in de facto relationships, and the changing face of families that, as he said, came *“in all shapes and sizes”*, not just *“the stereotype presented of the working father/husband, the mother ensconced in home duties and caring for two well-scrubbed children and the enthusiastic – but well trained – red setter puppy....”*

All that is still holding true as are, what he referred to as the *“quite rapidly changing societal values, some of which we might object to and even despair of...”*.

So, what then has changed?

Since 1994, families and societal mores, and family structures have continued to change.

In the twenty years between 1994 and 2014, the average age of marriage for men increased from just over 27 years to 31.5, and for women, from just over 25, to heading towards 30 years. It is perhaps not surprising then that they are also older nowadays when divorcing.

Interestingly, the number of marriages over the last two decades has increased slightly, from 110,000 marriages to 120,000 in 2014, but proportionate to the increase in population in that time, the rate of marriage is in fact decreasing.

The percentage of marriages that end in divorce has been increasing over time. According to the Australian Bureau of Statistics, around 20% of marriages entered into in 1990 could be expected to end in divorce. This proportion increased to almost 28% for all marriages entered into in 2011. The median duration of marriages ending in divorce is around 12 years, a slight increase from back in 1993, when it was around 11 years.

Let me pause here to observe that you will notice that some of my figures date back to 2011. They are the last available census figures. We are just a fraction early for this year's!

There are many other changes since Alastair Nicholson gave his Oration. I have decided to focus on a few.

One is the very significant change in the shape of the family, with increases in defacto relationships, same sex couples, and a marked increase in surrogacy. The impact of technology and globalisation is another. The prevalence of and response to family violence cannot be overlooked. Nor can significant mental health issues and the essential role of grandparents, to name just a few.

THE SHAPE OF A FAMILY

So let me start with the shape of the family.

As noted, Alastair Nicholson reflected upon the changing face of the family in 1994. Interestingly, he dealt with it in some detail, it being a matter of great moment then.

In addressing “*family types*”, he referred to it as a “*controversial*” topic, and one that “*provoke(d) intense discussion and debate*”. He spoke of that year as having included what he described as “*rather sterile discussions as to who could or could not be legitimately included in the family....*”

He concluded that:

“Families – as has always been the case – come in all shapes and forms. They may be couples with or without dependent children and living in a marriage or outside it; they may consist of one parent living with a child or children; or a couple each with their own children from previous relationships; they may consist of several generations....”

Twenty plus years on and we still discuss the definition of the family, and it remains a topic that still provokes controversy. That's no real surprise. Social changes frequently occur so rapidly, and often ahead or outside of church, law or society's awareness or preparedness.

I want to touch upon some of the biggest changes to “family types” since 1994.

An Increase in de facto relationships

First, de facto couples.

In 1994, de facto couples represented just over 8% of all couples. This followed a significant societal shift towards acceptance of de facto relationships, reflected in what was a large increase then from 5.7% in 1986.

By 2014, nearly 11% of couples were living in a de facto relationship.

Same sex relationships

When it comes to the shape of the family, we cannot overlook the significant increase in same sex relationships too. Between 1996 and 2011, the number of same-sex couples in Australia grew from 10,000 to 33,500, an increase of 330%. This massive increase may reflect a growing social acceptance and willingness to supply this information for census purposes, in addition to reflecting a genuine rise in numbers.

Alongside an increase in same sex relationships, there has been an increase in the number of children living in those families. In 2011, there were 6,300 children living with same sex couples, almost double the number from ten years before that. It may well be higher again when this year's census numbers are known.

For now though, we know that 12% of same sex couples had children at the time of the 2011 census, with a significant discrepancy between the genders, only 2% of male households compared to 22% of females. This included children from previous relationships, those conceived through technological support, or those who had been adopted or fostered.

That leads me to the topic of surrogacy.

Surrogacy

It is not surprising that Alastair Nicholson did not refer to this issue in his 1994 address.

The first case of paid surrogacy was reported in 1980, but its widespread use has really only occurred this century. And it has grown at a rapid pace.

It is difficult to obtain authoritative numbers of the surrogate births within Australia, but we do know that the numbers are very low. An estimated 96% of surrogacies are arranged outside the country.

Unofficial figures provided to The Hague, for the purpose of a report on international surrogacy arrangements, suggest that in the year ended 30 June 2012, about 1000 children were born to Australian intending parents in just India and Thailand alone.

The 2012 Hague report confirmed that in the 5 years between 2006 and 2011, the “market” for international surrogacy had grown by 1000%. The growth was attributed to a *“convergence of scientific, demographic, legal and social developments...”*

These developments most likely include increases in infertility, advanced IVF and artificial insemination techniques, and increased acceptances in some countries of same sex parenting or alternative family forms.

As is often the case, the law has had to catch up to medical and social change.

The legal (as well as ethical) issues raised are myriad. They include a child’s future ability to trace his or her birth origins or genetic heritage, assurances around the free and informed consent of surrogate mothers, regulation of the intermediary agents and agencies, the suitability of intending parents and mechanisms to guard against child abandonment.

All Australian States and Territories, (except the Northern Territory), have now enacted surrogacy legislation. Unfortunately, they have not responded uniformly. Although each has made commercial surrogacy arrangements within Australia to be illegal - that is, as opposed to altruistic surrogacy, where no money changes hands other than to reimburse the surrogate mother’s costs - the responses otherwise differ.

In New South Wales, Queensland and the ACT, it has also been made an offence to enter an international commercial surrogacy agreement.

To complicate the area, the Family Court, a federal court operating across state boundaries, is charged with the responsibility to make parental responsibility orders in relation to children within its jurisdiction. That includes the children born of the international surrogacy arrangements just discussed.

Although the child's best interests remain the paramount test, the case-law has some complications arising from differing judicial approaches in such cases.

Australia is by no means alone in these challenges. These are issues being discussed on the international stage via the Hague Conference that oversees the UN Convention on the Rights of the Child.

In Australia though, the House of Representatives' Social Policy and Legal Affairs Committee recommended, in April this year, that the practice of commercial surrogacy remain illegal in Australia, and that the Australian Government consider the development of a model national law that facilitates altruistic surrogacy in Australia.

FAMILY VIOLENCE

When Alastair Nicholson gave this Oration, he referred to family violence, but only briefly. The difference was not that it was less prevalent, or considered by him or the court to be less important but, compared to today, it was less widely discussed, there was less knowledge and research, and less intervention.

I started in legal practice, in 1974. As a 20 year old Articled Clerk, I had my first encounter with family violence. I will never forget the experience.

My Principal asked me to take instructions from a client, a woman. It was impossible not to notice a raw red crescent shaped scar across her forehead and eye. I asked her about it. "It's where he hit me with a whisky bottle", she told me. From a family where I'd seen only nurturing, never violence, at first I did not believe her, but to my horror, independent evidence proved her right.

Throughout my career, in both criminal and family law, I saw the scourge of family violence and yet, "the system" was mostly ill-equipped to handle it.

I refer to "the system" because, as tempting as it is to blame the courts, or the lawyers, or the

police, or the professionals who failed to report, or the legislators, or worst of all, (as has often been the case), the victims themselves, such blame fails to recognize that the lawyers, magistrates, judges, doctors, teachers, politicians, and the families at the heart of the experience, are all drawn from the same community. Any widespread cultural flaws, prejudices and misconceptions have sprung from that community.

In my 40 years of legal practice, I saw the wide arc of family violence. I saw responses that varied from dismissive, to insufficient or misdirected. I saw honest attempts to support the victims, successful steps, failed steps, steps forwards and steps backwards. I saw non-believers in the field, visionary people in the field, those who closed-mindedly blamed the other players, and those who open-mindedly collaborated across disciplines.

Unfortunately, I saw the full range of suffering, from children who trembled in fear knowing, without even seeing, what was happening or was threatened within their homes. Women who watched their every step, ever alert, ever alarmed, and knowing that even family couldn't know, wouldn't save them, and that there was no-one to whom they could turn without fear of worse retribution. And at the worst end of the spectrum, I saw lives lost at the hands of a partner or a parent from whom the most love and protection should be expected.

The reality, I should emphasise, is that although sometimes we speak in gender neutral terms about family violence, the research is clear; One in six women have experienced physical or sexual violence from a current or former partner, a figure very significantly higher than for men.

In 2014, 32 women were victims of domestic violence associated homicide, more than 1 woman every fortnight.

In mentioning that women are more commonly the victims of family violence, I am cautious to emphasise that men too are sometimes victims. That caution is borne of an experience many years ago, when, as a young Magistrate helping the government of the day launch a campaign against family violence, I made the mistake of talking only of women as the victims. Of course, they were most often, but I should have added that, of course, men too can be victims.

It was just the occasion when a newspaper reporter was present, so that the next morning an article appeared in the paper with a pretty full extract of what I had said.

One reader in particular was furious that I had not acknowledged men as victims of family violence.

He decided to track me down to share the rather strong views he had formed about me.

I was sitting as a coroner at the time. Now, usually the receptionist at the Coroner's Court was extremely cautious about whom she put through to the coroner, but on this occasion, this irate man happened to share the same surname as my husband. So she happily put him straight through to me.

All I can tell you is that he was somewhat disarmed when I started the conversation with "Hello darling...."

In my early days in practice, the obstacles for those seeking help or protection were immeasurable.

The seriousness of the family violence problem was often under-estimated by police who, in fairness, were lacking in training and resources to deal with its complexities.

It was a cumbersome and expensive process to obtain protection from the courts. Most women could not afford it.

Many women could also not afford the risk of their partner knowing about a court application in advance, and the evidentiary requirements were unsuited to conduct that mostly took place in the dark privacy of people's homes with no witnesses to support a case, and no medical reports when the victim had felt too ashamed to have sought help from a doctor.

In the second half of the 1980's, the *Crimes (Family Violence) Act* came into existence. It was seen as revolutionary. It provided a more accessible civil option for victims of family violence to obtain protection in Victorian Courts.

In the following decades, there were many changes and refinements to the legislation, and to the Family Law Act too.

Many were directed at ways to make it easier for victims to access the courts, for example, with police taking the proceedings for protection on their behalves.

Or the reforms were directed at expansion of, and greater clarity about what constituted family violence, and a widening of the group of people who could obtain protection.

And there was much attention directed towards better protection for children, and co-ordination between the federal Family Court, charged with making orders about the time a child would spend with a parent, and the state courts, that were the starting point for protection orders.

There were also improvements in the education of police, the judiciary and other professionals about family violence, and the introduction of specialist Magistrates' Courts.

According to the recent Victorian Royal Commission into Family Violence, the number of Family Violence Intervention Order applications finalised by the Magistrates' Court increased by nearly 35% between 2009-10 and 2013-14. Although that increase may relate, at least in part, to a greater preparedness to report and to seek help from the legal system, we do know that it also reflects the endemic nature of the problem. And we do know that for everyone reporting, there are still others who are not.

Although several generations of legislators, judges, magistrates, lawyers, police and community workers have genuinely recognised the problems and worked earnestly on solutions, it is still recognised that more is needed.

The community was rocked and shocked by the tragic murders of Darcy Freeman, the little Farquarson boys and of course Luke Batty, all at the hands of their fathers.

From the moment that she lost Luke, Rosie Batty made the courageous decision to openly engage with the public.

What she said resonated around the country.

"I want to tell everybody," she said, "that family violence happens to everybody. No matter how nice your house is, how intelligent you are. It can happen to anyone, and everyone...."

Rosie showed her extraordinary courage and resilience, as well as the ability to communicate her message, whether to Prime Ministers or to other mums. It made her selection as the 2015 Australian of the Year an inspired and inspiring choice.

People have listened and the dimensions of the problem have been better understood.

The Victorian Royal Commission report has recommended, amongst other things, Support and Safety Hubs in local communities, new laws to ensure privacy considerations do not trump victims' safety, funding to boost services that support victims and families – including housing – an expanded investigative capacity for police, more specialist family violence courts, family violence training and education, and an independent Family Violence Agency.

And now, the implementation process is underway.

I think it is fair to say that as a community, we are aware and motivated to tackle family violence in a way that was not as promising or holistic in 1994.

TECHNOLOGY

Technology has brought many changes.

When Alastair Nicholson delivered this Oration in 1994, there were no smart phones or ipads, no Facebook, no Instagram or Twitter.

What difference, if any, have these things made to family life and family law?

It is likely to be apparent to any family lawyer that a consequence of the boom in technology is not only globalisation in its broadest sense, but also how romances have formed across world borders, with an accessibility that simply did not exist before.

Inevitably, such romances often blossom and develop into relationships, with children, with breakdowns and all the hardships that they entail, but with the added burden of families being further dislocated by distance.

Every judge dreads hearing cases about what is known as “relocation”. That is, as to where children shall live, when their parents separate but want to live in different countries. They

can be difficult cases with no winners. Work and family can genuinely pull good and caring parents in different directions, with the consequence for children being raised a very long way away from one parent or the other.

It is not necessarily a new problem, but it is one that now exists on a scale that could not have been anticipated a generation ago.

Of course, an upside of technology is that it does facilitate easier contact for families separated by distance. It's no longer a matter of communication being slowed to a turnaround of letters, or even the sometimes sterile feel of affection typed into emails. Between all the platforms that enable real-time visual access, without expense, the capacity to develop and nurture precious relationships, despite physical separation, is greatly enhanced.

A child can share homework with an absent parent, or see and hear a bedtime story being read, or just laugh and chatter about the banalities of a day at school.

In appropriate circumstances too, technology can provide a safe and supervised way for a child to stay in touch with a parent with whom the child cannot be left in close proximity.

Another unexpected consequence of the technology boom - one that could not have been anticipated in days gone by - is the vast amount of evidence often captured via people's social media postings.

I recall several cases of a parent claiming they could no longer afford school fees for their children, only to be cross-examined about their Facebook entries, in which they boasted to friends of their lavish expenditure on expensive cars, clothes, travel or other such extravagances.

Or, of parents claiming they had at all times acted reasonably with the other parent, only to be forced to sit through the excruciating accounts of their provocative and even vile text messages that so clearly disproved their claim.

I could turn to many other topics, but time precludes me. So let me just add a few brief final observations.

WHAT I LEARNED ABOUT FAMILIES IN 18 YEARS IN THE FAMILY COURT

Preparing for this Oration certainly made me reflect on families, and on what I learned about them across all those years in the Family Court.

Eighteen years in the Family Court taught me many things.

One was that grandparents are often the great unsung heroes of many Australian families.

The Australian Institute of Family Studies reports an increasing number of grandparents providing child care for their grandchildren – particularly as more mothers work outside the home. Up to 30% of grandparents provide child care at least once per week.

Grandparents often provide safe haven too when a couple separate. They are often the trusted ones, the ones who can step in to supervise a parent's time with a young child when there are allegations of, or a proven risk to a child. Frequently, they are called upon to step in further: to house a family not coping well, perhaps because of a parent's (or both parents') mental health issues or substance abuse. At the extreme end of things, some grandparents volunteer to put their own lives on hold, to raise their grandchildren.

ABS figures from 2004 showed 22,500 grandparent families in Australia. That figure would inevitably be higher, one would expect, when the next census figures are to hand. I say that because we know that parental mental health and substance abuse issues have only risen in number.

Australian Institute of Family Studies figures show that almost 60% of parents, accessing family law services and courts, have mental health issues, and more than 40% have issues with the abuse of alcohol or drugs.

In all those years of listening to family members in the courtroom, I learned that no family is the same as any other. But still, no matter how different each family is, they do share much in common.

That observation was reinforced for me just recently – in quite a different context - when we were privileged to be invited to an Iftar dinner, for the breaking of the daily fast of Ramadan, in a private home. I was struck by all the obvious differences from our own family dinners.

The food was different. So too were many customs. But so much more than that was just the same.

We saw the joy and warmth of a family sitting together, enjoying customary dishes, sharing stories and views, and first generation parents, just like me, who were cognisant of what had been their parents' aspirations for them in this new country, and were now full of pride as their bright opinionated children showed that their own aspirations had no limits.....

In the Family Court, I learned something else, something about which I cannot help but feel very strongly. I learned just how much children need and deserve to be spared from the worst of their parents' conflict: that otherwise the pain and damage to them can be profound.

The research shows that children caught in high conflict families frequently have lower academic performance, lower social achievement, worse psychological adjustment, and that they are more likely to experience depression, anti-social, impulsive or hyper-active behaviour, as well as behavioural problems at school.

Not only did the experts tell us that, but so too did the children. Sadly, too often the parents – immersed in their own pain at the time - did not hear it.

And finally, I feel certain that whatever its form, and whatever law or ceremonies are or are not wrapped around it, people will, as they always have, form relationships, have children, live in groups and, yes, despite every best support and effort, some relationships will not be sustained.

I have always held the same view that: it is how we support family units – no matter what their shape - and most certainly how well we respond to conflict, family breakdown and the protection of family members, that defines us as a community.

Hopefully, in another 20 years, we will again be even better at it.