# Articles

# Immunisation disputes in the family law system

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*This article examines the impact of the new 'No Jab, No Pay' and 'No Jab, No Play' laws on future Family Court disputes between parents in relation to immunisation of children. The article reviews previous disputes in relation to immunisation, looking particularly at what evidence has been required by the court in disputes and how the courts have formulated the best interests of the child in these disputes. Given that most cases result in orders for immunisation of children, the article recommends that such cases should be settled without lengthy litigation, but recognises that the entrenched views of the parties in these disputes prevent settlement.*

## Introduction

It is generally accepted that immunisation is one of the most successful public health measures.[1] In particular, paediatric vaccines have greatly reduced the incidence of infectious disease and childhood mortality globally.[2] In Australia, to be considered fully immunised, children are expected to have received specific immunisations before they turn 1, 2 and 5 year/s of age, according to the National Immunisation Program Schedule ('NIP').[3]

Australia has one of the highest vaccination rates in the world.[4] However, opposition to vaccination has existed whenever and wherever vaccines are introduced.[5] In 2014–15 the Australian National Health Performance

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1 Eve Dubé, Maryline Vivion and Noni E MacDonald, 'Vaccine Hesitancy, Vaccine Refusal and the Anti-Vaccine Movement: Influence, Impact and Implications' (2015) 14 *Expert Review of Vaccines* 99.

2 Jon Wardle et al, 'Complementary Medicine and Childhood Immunisation: A Critical Review' (2016) 34 *Vaccine* 4484.

3 For a comprehensive history of the introduction of the NIP and its impact, see Wendy Nixson, 'Does Australia Need Compulsory Immunisation?' (2016) 23 *Journal of Law and Medicine* 907.

4 United Nations Children's Fund, 'The State of the World's Children 2016: A Fair Chance for Every Child' (Report, June 2016) Table 3 <https://www.unicef.org/publications/files/UNICEF_SOWC_2016.pdf>.

5 Gregory A Poland and Robert M Jacobson, 'The Age-Old Struggle against the Antivaccinationists' (2011) 364 *New England Journal of Medicine* 97; For a history of anti-vaccination movements, see Dubé, Vivion and MacDonald, above n 1, 100–8; see also Ella Stewart-Peters and Catherine Kevin, 'A Short History of Vaccine Objection, Vaccine Cults and Conspiracy Theories', *The Conversation*, 10 July 2017 <https://theconversation.com/a-short-history-of-vaccine-objection-vaccine-cults-and-conspiracy-theories-78842>.

Authority, which measures child immunisation rates annually, found that while vaccination coverage had improved in some local areas, there were a number of areas where rates remain potentially too low to prevent the spread of diseases.[6] Research has shown that 'parental beliefs about immunisation in general — and vaccine side effects in particular — are the major reasons for incomplete immunisations among Australian children'.[7] In attempts to increase the levels of vaccination, what have been termed 'No Jab, No Pay' and 'No Jab, No Play' laws have been introduced. The No Jab, No Pay laws are federal laws removing the eligibility to receive certain family assistance payments if a child is not fully immunised or they do not have an approved medical exemption; these laws came into effect on 1 January 2016. The No Jab, No Play laws are state laws that have been introduced in certain states excluding children that have not been fully immunised from childcare services; these various laws also started to come into effect on 1 January 2016. This article will consider the position taken to date in the Family Court of Australia and the Federal Circuit Court of Australia (the 'Family Law Courts') in relation to disputes over child immunisation between separated parents and whether and how the No Jab laws are likely to impact on the immunisation disputes in the Family Law Courts.

## How have the Family Law Courts resolved immunisation disputes?

### How many cases and what were the outcomes in relation to immunisation?

This article focuses on immunisation disputes as an example of an ideological difference in relation to a currently healthy child's wellbeing that may arise between separated parents.[8] The article only considers cases where one parent disagrees with immunisation, believes that their child can be protected by homeopathic alternatives, or objects to immunisation of their particular child due to concerns about adverse reactions,[9] as opposed to parents who have not arranged immunisations mainly due to practical or logistical reasons such as recurrent minor illness, social disadvantage, lack of access to medical

6 National Health Performance Authority, *Healthy Communities: Immunisation Rates for Children in 2014–15 — Overview* (2016) MyHealthyCommunities <http://www.myhealthycommunities.gov.au/our-reports/immunisation-rates-for-children/february-2016>. See also the Department of Health (Cth), *AIR — Current Data* (27 October 2017) Immunise Australia Program <http://www.immunise.health.gov.au/internet/immunise/publishing.nsf/Content/acir-curr-data.htm> — showing the annualised quarterly reports of the percentage of fully immunised children from the Australian Immunisation Register.

7 Glenda Lawrence et al, 'Reasons for Incomplete Immunisation among Australian Children: A National Survey of Parents' (2004) 33 *Australian Family Physician* 568, 569.

8 For another example, see ABC Radio National, 'Family Court Rulings on How to Raise Children', *Law Report*, 9 May 2017 (Maria Barbayannis) <http://www.abc.net.au/radionational/programs/lawreport/family-disputes-over-private-schooling/8490086>.

9 Matilda Hamilton et al, 'Why Do Parents Choose Not to Immunise Their Children?' (2004) 117(1189) *New Zealand Medical Journal* 1; Dubé, Vivion and MacDonald, above n 1; Maria Yui Kwan Chow et al, 'Parental Attitudes, Beliefs, Behaviours and Concerns towards Childhood Vaccinations in Australia: A National Online Survey' (2017) 46 *Australian Family Physician* 145.

assistance or the turmoil caused by a complex separation.[10] The article considers whether such disputes have increased following 1996 and 2006 amendments increasing shared post-separation decision-making, and the outcome of those disputes.

The research found 13 cases since 2002 where immunisation was either the sole issue in dispute between the parents, or at least was one of the main issues in a larger parenting dispute. It is remarkable that 12 of those cases have been decided since 2011. The reasons for this upsurge in decisions may be simply that more judgments are accessible in the last decade;[11] that the number of parents strongly opposed to vaccination has increased; or that changes in the *Family Law Act 1975* (Cth) (‘*FLA*’) in 1995 and 2006 have led to increased challenges in ongoing parent-child relationships in relation to issues where compromise is difficult.[12]

An analysis of the 13 parenting decisions where immunisation was the sole or a major issue in dispute in the Family Law Courts found only two cases[13] where the court did not make an order supporting immunisation of the child in question and one case where an appeal resulted in an order for a rehearing of the matter after further testing of the child for possible adverse reactions; during that rehearing, orders for vaccination were made by consent.[14] The immunisation disputes arise in various forms in decisions — as a specific or discrete issue solely considering immunisation, or in a broader context of the ambit of shared parental responsibility and shared parenting decisions. In only two of the 13 cases was the father,[15] as opposed to the mother, objecting to immunisation of the child.

In one of the cases dismissing an application for immunisation, *T v M*,[16] the father filed an application for the children to be vaccinated during an 18-day Family Court hearing in relation to parenting matters. The judge referred that

10 Lawrence et al, above n 7; Peter B McIntyre, Alison H Williams and Julie E Leask, ‘Refusal of Parents to Vaccinate: Dereliction of Duty or Legitimate Personal Choice?’ (2003) 178 *Medical Journal of Australia* 150, 151.

11 Since 2007 the Family Court has ‘adopted a more expansive policy for the publication of its judgments to make them accessible to the community’: Family Court of Australia (‘FCA’), ‘Annual Report 2006–2007’ (Report, 2007) 67. The websites for the FCA and the Federal Circuit Court of Australia indicate that they ‘now make most of their judgments available’: see FCA, *Law Reporting in Family Law Cases* (3 May 2016) <http://www.familycourt.gov.au/wps/wcm/connect/fcoaweb/judgmen ts/law-reporting-in-family-court-cases/>; FCA, *Law Reporting in Family Law Cases* (3 May 2016) <http://www.federalcircuitcourt.gov.au/wps/wcm/connect/fccweb/judgments/law-rep orting-in-family-court-cases/>.

12 Belinda Fehlberg et al, *Australian Family Law: The Contemporary Context* (Oxford University Press, 2nd ed, 2015) 325.

13 *T v M* [2002] FMCAfam 277 (30 August 2002); *Flynn v Jeffcott* [2011] FMCAfam 1239 (25 November 2011). The analysis dated back to 2002: there were only 13 cases found where immunisation was either the sole issue in dispute between the parties, or at least one of the main issues in the parenting dispute.

14 *Mains v Redden* (2011) 46 Fam LR 400 (‘*Mains*’); In the case of *Rilak & Tsocas [No 8]* [2015] FamCA 1235 (13 November 2015) [503] (‘*Rilak*’), it is stated that the *Mains* ‘proceedings were settled during the re-hearing, albeit after the cross-examination of the experts and orders for vaccination were made in terms agreed between the parties’.

15 *Howell v Howell* [2012] FamCA 903 (1 November 2012) (‘*Howell*’); *Landis v Landis* [2013] FCCA 2413 (17 December 2013) (‘*Landis*’).

16 [2002] FMCAfam 277 (30 August 2002).

application to the Federal Magistrates Service and the application was heard a few days after the Family Court judgment was delivered ordering that the children should reside with their mother who would have the long-term and day-to-day responsibility for their welfare. In the Federal Magistrates Court, Brown FM thought it clear that this was an order granting the mother sole parental responsibility and commented:

> it continues to be the prerogative of parents to determine whether or not their children are vaccinated. The state is encouraging and supportive of such vaccinations but has not as yet legislated to make them compulsory. In my view, bearing this in mind, vaccination is not an issue which, by its nature, involves the *parens patriae* jurisdiction. The mother has been invested with the authority to make this decision in respect of J and J. I can see no reason to look behind this authority. Accordingly, I have reached the view that the father's application should be dismissed.[17]

This case is one of the only cases analysed that explicitly acknowledges that parents may legitimately decide not to immunise their children. The unwillingness of the Federal Magistrate to make further orders in the case may well result from the lengthy history of proceedings between the parties, including the very recent 18-day hearing in the Family Court. In 10 of the 13 cases where one parent was opposed to immunisation, the courts have made orders that should result in the child being immunised: this has been done either by ordering that the other parent has sole parental responsibility for all major long-term issues,[18] for all medical matters[19] or just for immunisations,[20] or simply ordering that one of the parents arrange the child's immunisations.[21]

## The legal basis for the decisions

These decisions are parenting proceedings under pt VII of the *FLA*. Hence they are determined on the basis that the best interests of the child are the paramount consideration.[22] The decision to immunise falls under the scope of 'parental responsibility'[23] and is considered a 'major long-term issue'.[24] If there are no parenting orders in place, each of the parents has parental responsibility and neither parent has an obligation to consult with the other about major long-term issues before making a decision. Therefore, one parent

17 Ibid [28].

18 *Arranzio v Moss* [2015] FamCA 544 (17 July 2015) ('*Arranzio*'); *Malik & Malik* [2016] FamCA 473 (10 June 2016); *Garzelli v Lewis [No 3]* [2014] FamCA 742 (9 September 2014).

19 *Howell* [2012] FamCA 903 (1 November 2012).

20 *Tolbert & Tolbert [No 2]* [2016] FamCA 532 (19 May 2016).

21 *Holinski v Holinski* [2016] FamCA 45 (22 January 2016); *Landis* [2013] FCCA 2413 (17 December 2013); *Kingsford v Kingsford* [2012] FamCA 889 (19 October 2012) ('*Kingsford*'); *Duke-Randall v Randall* [2014] FamCA 126 (12 March 2014) ('*Randall*'); *Rilak* [2015] FamCA 1235 (13 November 2015).

22 *FLA* s 60CA.

23 Ibid s 61B. See below for a discussion on this: *Randall* [2014] FamCA 126 (12 March 2014) and *Mains* (2011) 46 Fam LR 400.

24 Ibid s 4. In the case of *Withers v Russell* (2016) 55 Fam LR 447, Watts J stated that '[t]o avoid any doubt ... a decision in respect of the immunisation of the children ... [is a decision] about a major long term [issue].'

could simply take the child to be vaccinated, knowing the other parent may well object.[25] They would then face the consequences in any subsequent proceedings. This occurred in the case of *Kingsford* where, although the parties had been before the court in relation to parenting issues for the child, no orders had yet been made. The court noted that the father:

> authorised his [new] wife to take the child to receive traditional vaccinations without the consent of her mother. The father's position was that he had hoped to continue to secretively vaccinate the child throughout her childhood and had hoped her mother would never find out. The father said that he had believed that the mother would become very upset if she discovered that the child had been traditionally immunised and so he had decided that it would be non productive for the mother to be told.[26]

The court voiced disapproval of the father's actions, saying:

> The father's behaviour in having the child immunised in secret reflects very poorly on his attitude to the responsibilities of parenthood. I reject his position that 'the end justifies the means'. I am not critical of the mother. She has openly followed a program of homeopathic immunisation with the full knowledge of the father and without subterfuge. She genuinely embraces it as being in the child's best interests.[27]

However, this disapproval did not prevent the court from ordering that the child should continue to be vaccinated in accordance with a schedule of catch-up vaccines.

If a parenting order of shared parental responsibility is in place, then any decision to immunise the child would require the parent wishing to immunise to consult the other parent about the decision and make a genuine effort to come to a joint decision.[28] Of course, a parent in this situation who wants their child to be vaccinated may well act unilaterally and take the child to a clinic to be immunised without consulting the other parent. Again, the parent would face possible court disapproval and a questioning of their parenting capacity which may well impact on other parenting orders; but in relation to the single issue of immunisation, it is still very likely that Family Law Court would order continued immunisation as being in the best interests of the child.

Interestingly, in the case of *Randall*[29] the mother had argued, in one of the many interim hearings in those proceedings, that vaccination should not fall under the auspices of parental responsibility but rather should 'be considered a special medical procedure' and therefore the proceedings would be dealt with within the court's medical procedure protocols in div 4.2.3 of the *Family Law Rules 2004* (Cth) ('*FLR*'). In accordance with r 4.10, Collier J ordered that the mother should notify the Department of Human Services and the Human Rights Commission of her application. In a later interim hearing, Collier J decided that the matter is not a case to which the 'special medical

25 Contrast this with the position in England and Wales where 'the hotly contested issues of immunisation' is one of the small group of decisions, including changing the child's surname, sterilisation and circumcision of a child, that cannot be taken unilaterally by one parent: *Re C (Welfare of Child: Immunisation)* [2003] EWCA Civ 1148 (30 July 2003).

26 *Kingsford* [2012] FamCA 889 (19 October 2012) [47].

27 Ibid [124].

28 *FLA* s 65DAC.

29 *Duke-Randall v Randall* [2014] FamCA 126 (12 March 2014).

procedures' of the *FLR* apply. This is eminently sensible, as otherwise, vaccination would have been considered akin to gender reassignment or sterilisation,[30] and a routine childhood event for most children would have become a 'medical procedure which requires court authorisation'.[31]

## Evidence required?

Given that the overwhelming majority of traditional medical practitioners are in favour of immunisation and that immunisations are administered to over 90 per cent of Australian children,[32] it might be thought that a court could take judicial notice of the fact that the best interests of a child are generally served by being immunised without expert evidence having to be introduced on the point.[33]

However, in the case of *Flynn v Jeffcott*,[34] Scarlett FM (as then was) said:

> I am somewhat dubious about finding that the court can take judicial notice about the benefits or otherwise of vaccination against childhood diseases. In the absence of medical evidence one way or the other I am not prepared to make a finding that it is in [X]'s best interests to be vaccinated against certain diseases, nor am I prepared to make an order permitting the father to do so.[35]

In that case, the father was applying, inter alia, for an order that he would be authorised to take the child for vaccinations without the mother's consent. The mother shared her father's belief that 'some vaccines contained the cells from aborted foetuses'[36] and expressed the view that she preferred to use natural remedies rather than conventional medicine. Neither party presented expert medical or scientific evidence to the court. Scarlett FM ordered that the parents have equal shared parental responsibility, but simply made no order in relation to immunisation despite this being a significant point of contention between the parents. The implications of this are that the parents would now have to make a joint decision in relation to immunisation, to consult each other and to make a genuine effort to come to a joint decision.[37] This seems extremely unlikely given the directly opposing views of the parents, and so the order is likely to result in the child not being immunised.

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30 'Medical Procedure Application' is defined in the Dictionary to the *FLR* which provides that it is an application 'seeking an order authorising a major medical procedure for a child that is not for the purpose of treating a bodily malfunction or disease'. The definition provides an example of such a procedure — 'a procedure for sterilising or removing the child's reproductive organs'.

31 *Re Jamie* (2013) 50 Fam LR 369, 400 [153] (Finn J); For a further discussion, and rejection in that case, of whether immunisation is a medical procedure in which div 4.2.3 of the *FLR* applies, see *Mains* (2011) 46 Fam LR 400, 410–18 [65]–[108].

32 Australian Institute of Health and Welfare, 'Healthy Communities: Immunisation Rates for Children in 2015–16' (Report, MyHealthyCommunities, 8 June 2017) <http://www.myhealthycommunities.gov.au/our-reports/immunisation-rates-for-children/june-2017/report/improvements-in-immunisation-rates>.

33 For a full discussion and explanation of judicial notice and s 144 of the *Evidence Act 1995* (Cth) in family law matters, see Zoe Rathus, 'A Call for Clarity in the Use of Social Science Research in Family Law Decision-Making' (2012) 26 *Australian Journal of Family Law* 81, 84–7.

34 [2011] FMCAfam 1239 (25 November 2011).

35 Ibid [121].

36 Ibid [64].

37 *FLA* ss 65DAC(2)–(3).

Indeed, in *McGregor v McGregor*,[38] the Full Court discussed the concept of judicial notice and s 144 of the *Evidence Act 1995* (Cth) and listed examples of information or issues that would not fall within judicial notice. The Court gave as an example, the administration of vaccinations, and stated:

> The conflict of expert opinion evidence in relation to the benefits and risks of immunisation precluded any prospect of the Court taking 'judicial notice' under s144 of the Evidence Act. If an issue in proceedings is controversial, it is almost inevitable that there will be differing credible expert opinions in relation to it and demonstrably it would not fall within the operation of s 144.[39]

Even though the issue may be controversial as between the parties, it is arguable whether opinions opposed to vaccination can be described as those of 'credible experts'. Generally, as will be seen below, the courts are quick to dispose of evidence which does not fit the medical orthodoxy. However, the fact that the benefit of immunisation is the issue central to the dispute makes it less likely that a court will take judicial notice of the benefit of conventional immunisation in the near future.[40] Judicial notice is not the means to place even mainstream scientific perspectives, including those by peak scientific organisations, before decision-makers in legal proceedings where the parties have not done so themselves.[41] Therefore, expert or scientific evidence will often be introduced by the parties in support of their decision. The evidence required will differ depending upon the nature of the objection to immunisation. The objection generally takes one of three forms, although these may coexist: objection to all forms of vaccination due to various beliefs; a belief that homeopathic alternatives are preferable to immunisation; and a belief that the child in question is particularly susceptible to adverse reaction from immunisation.

## General objection to immunisation

In cases where the parent is generally opposed to immunisation, that parent will usually try to also present their case as one where homeopathic alternatives are preferable, or that the child has a higher risk than the general population of adverse reaction to immunisation. A simple opposition to vaccination due to the parent's beliefs is almost bound to result in the court ordering the child being immunised, both because the court will prefer the medically orthodox evidence and because the court will find that immunisation is in the child's best interests without medical evidence particular to the child. For example, in *Arranzio*, the mother had a 'conscientious objection to vaccination on the basis of her research and her

38 (2012) 47 Fam LR 498, 510–12 [64]–[74].

39 Ibid 511 [71]; referring to *Mains* (2011) 46 Fam LR 400.

40 See the, perhaps, analogous topic of judicial notice and climate change: Brenda Heelan Powell and Josephine Yam, 'Judicial Notice of Climate Change' (Paper presented at the Symposium on Environment in the Courtroom: Evidentiary Issues in Environmental Prosecutions and Hearings, University of Calgary, 6–7 March 2015).

41 Gary Edmond, David Hamer and Emma Cunliffe, 'A Little Ignorance Is a Dangerous Thing: Engaging with Exogenous Knowledge Not Adduced by the Parties' (2016) 25 *Griffith Law Review* 383, 384.

comparison of risk'.[42] In relation to her general opposition to immunisation, she relied upon the affidavit evidence of Dr K, whose specialisation was not mentioned by the court, while the father relied upon the evidence of Dr G, a consultant physician in allergic diseases who specialised in allergy and immunology. Hogan J summarised the medical evidence at some length before noting that:

> Dr G took issue with most of the evidence given by Dr K ... Whilst acknowledging that it was known and recognised that various vaccines can cause adverse effects, he described the assertion that the chicken pox vaccine caused shingles later in life as 'bunkum'. He also took issue with the assertion that the measles had been eradicated, noting that a problem was being encountered as a result of groups of people who are not immunised: ... He described as nonsense the assertion that the United States of America ceased using the polio vaccine because it was in some way responsible for polio ...
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> ...
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> Dr G also expressed his opinion that ... there is no evidence that vaccines cause cancer ...[43]

## A belief in homeoprophylaxis ('HP')[44] as opposed to conventional immunisation

In *Kingsford*, Bennett J had the benefit of written reports and oral evidence from a senior paediatrician (Dr J) and a homeopathic practitioner (Dr G). The evidence of Dr G was dismissed by stating that his explanation of why HP works was not:

> an attempt to use 'scientific evidence' to support the use of homeopathy, but rather, Dr G is justifying the use of homeopathic immunisation using principles which are 'fundamental in natural medicine and homeopathy in particular' and which are, on his own evidence, foreign to traditional medical science.[45]

After outlining the evidence of both experts at some length, her Honour said:

> To the extent to which Dr G's evidence conflicts with Dr J's evidence, principally the efficacy of HP, I prefer Dr J's evidence.
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> ...
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> From a consideration of all of the evidence, and in particular the evidence of Dr G and Dr J, it appears to me that the efficacy of homoeopathic vaccines in preventing infectious diseases has not been adequately scientifically demonstrated. Dr J's evidence is that there is as yet not enough evidence that HP vaccines work. I accept that evidence as being accurate.[46]

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42 *Arranzio v Moss* [2015] FamCA 544 (17 July 2015) [202].
43 Ibid [231]–[232].
44 Jon Wardle, Cameron Stewart and Malcolm Parker, 'Jabs and Barbs: Ways to Address Misleading Vaccination and Immunisation Information Using Currently Available Strategies' (2013) 21 *Journal of Law and Medicine* 159, 162 state that HP is 'difficult to define but a basic definition is that it involves the introduction to the body of "potentised substances" so as to prevent infection disease'.
45 *Kingsford* [2012] FamCA 889 (19 October 2012) [99].
46 Ibid [114], [116].

The scientific consensus in relation to homoeopathy may be evolving so that there is now little 'tolerance toward proselytising claims of efficacy in respect of homeopathy'.[47] In 2015, the National Health and Medical Research Council ('NHMRC') concluded that 'there are no health conditions for which there is reliable evidence that homoeopathy is effective'.[48] The Council's study did not consider any evidence about 'homeopathic vaccines';[49] then NHMRC Chief Executive Officer Professor Warwick Anderson said that it would be almost impossible to obtain evidence to prove the ineffectiveness of homoeopathy vaccines. He noted that:

> No research ethics committee would support a controlled trial in which some children were given proven medical vaccines that protected them against disease and others were given unproven homoeopathic vaccines ... [but there] is nothing in the science of homoeopathy to conclude effective vaccines could be produced that way.[50]

In addition there is a recent court ruling that there is no reasonable basis in medical science for the representation that homeopathy is a safe alternative means to vaccination of preventing whooping cough. In 2014, the Federal Court upheld an Australian Competition and Consumer Commission ('ACCC') ruling that a homoeopathy company misled the public by claiming its 'vaccine' was an alternative to the whooping cough vaccine.[51] This 'increasingly scientifically marginalised existence for homeopathy'[52] may lead to a future court being asked to take judicial notice about the non-efficacy of homeopathic alternatives to conventional immunisation.

## A belief that the particular child should not be vaccinated

Where a parent is claiming that their child should not be vaccinated because they have a medical contraindication to vaccination, it is clear that medical evidence will be required from a medical practitioner, and the court will prefer that practitioner to have examined the child, rather than to give general evidence about adverse reactions.[53] In *Arranzio*, the mother, who had accepted that 'irrespective of any scientific evidence put before her, she will never

47 Ian Freckelton, 'Editorial: The Medico-Scientific Marginalisation of Homeopathy: International Legal and Regulatory Developments' (2015) 23 *Journal of Law and Medicine* 7.

48 NHMRC, 'Evidence on the Effectiveness of Homeopathy for Treating Health Conditions' (Information Paper, March 2015) 6; See also, Science and Technology Committee (UK), *Evidence Check 2: Homeopathy* House of Commons Paper No 4, Session 2009–10, 8 February 2010) <https://www.publications.parliament.uk/pa/cm200910/cmselect/cmsctech/45/4502.htm>.

49 NHMRC, above n 48.

50 Sue Dunlevy, *National Health and Medical Research Council says homoeopathy doesn't work and patients are putting their health at risk* (11 March 2015) news.com .au <http://www.news.com.au/lifestyle/health/health-problems/national-health-and-medical-research-council-says-homoeopathy-doesnt-work-and-patients-are-putting-their-health-at-risk/news-story/285c1be7ad6cda98883b899e2bf2846a>.

51 *Australian Competition and Consumer Commission v Homeopathy Plus! Australia Pty Ltd* (2014) 146 ALD 278.

52 Freckelton, above n 47, 7.

53 In *Randall* [2014] FamCA 126 (12 March 2014), the Court relied on the uncontested evidence of a single expert medical report which concluded that the children did not have any increased risk of side effect or adverse events than the general population. The report

consent to the child being vaccinated',[54] relied upon the affidavit evidence of Dr K, whose specialisation was not mentioned by the court, and the affidavits and oral evidence of Dr J, a general practitioner, whose patients regarded her as an 'environmental consultant', to show that the child had underlying health issues placing him at high risk of adverse reaction from immunisation. The father relied on the evidence of Dr G, a consultant physician in allergic diseases who specialised in allergy and immunology. Hogan J found:

> Dr K has never seen or examined the child. Any purported assessment by her rests entirely upon information provided to her by the mother who is vehemently opposed to vaccination.
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> ...
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> If they are needed, additional reasons for my conclusion that no weight can sensibly be accorded to Dr J's opinions can be found in that she was prepared to provide an opinion to the mother ... — in which she outlined that the child had an 'underlying immune shift' — in circumstances where she had not even seen him personally at that time but, again, relied on the history provided by the mother and on the mother's assertion that she (the mother) had suffered consequences *caused by* her vaccination as a child as the basis for her 'diagnosis'.[55]

Her Honour went on to state, 'Dr G did not accept that the child's risk of exhibiting an adverse outcome from the administration of vaccine was adversely high. He said the child was at no greater risk than anyone else.'[56] Her Honour made a very clear finding in favour of the evidence of Dr G, the orthodox medical practitioner, when refusing the order sought by the mother that the father be restrained from vaccinating the child without her permission:

> Given my analysis of Dr J's willingness to approach her involvement with the child on the basis of unquestioning acceptance of the mother's assertion that she had suffered an adverse reaction from vaccination and Dr K's similar willingness to proceed only on the basis of information provided by the mother and her catalytic reliance on her reported observations of the health issues encountered by her cat after receiving vaccine, I prefer the evidence of Dr G to that given by Drs J and K.[57]

Expert evidence is not always presented in these cases. In *Howell v Howell*, the father was strongly opposed to immunisation because it was 'contrary to all of his strongly held beliefs including his acceptance of Religion T, vegetarianism and acceptance of traditional Chinese medicines and a distrust of modern medicine'.[58] The child had been homeopathically immunised while the parents were still together and the father still 'did not believe in immunization as the body needed to build up its own immunity'.[59] Neither party introduced medical evidence in relation to immunisation. Young J found

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was not challenged by the mother because she had not paid the expert's fees to appear, and despite stating that she would submit evidence in support of the risks of vaccine damage, she had not done so. Not surprisingly, the mother was unsuccessful in preventing the father obtaining an order to immunise the children.

54 *Arranzio v Moss* [2015] FamCA 544 (17 July 2015) [202].
55 Ibid [204], [218] (emphasis added).
56 Ibid [250].
57 Ibid [255].
58 [2012] FamCA 903 (1 November 2012) [238].
59 Ibid [235].

that it was in the child's best interests for the wife to have sole parental responsibility in relation to the child's health issues, but otherwise the parents should have equal shared parental responsibility. In *Landis*,[60] no expert evidence was presented by either side in relation to immunisation. Scarlett J quoted from the judgment of Bennett J in *Kingsford* where her Honour had said:

> In these circumstances, I find that not immunising (the child) by way of conventional immunisation would expose her to a risk of harm through infection with a preventable disease which risk is unacceptable in the context of traditional immunisation practices. The risk of harm as a result of traditional vaccination is not so high as to outweigh the risk of infection.[61]

Scarlett J considered that he should follow her Honour's decision and, despite granting the vaccine-hesitant father sole parental responsibility, held that it was in the child's best interests to undergo the normal program of immunisation; the task of organising the immunisations was entrusted to the mother. Interestingly *Landis*, unlike *Kingsford*, was not a case in which the father was suggesting homeopathic alternatives as opposed to immunisation, so relying on her Honour's finding in *Kingsford* without more suggests that any anti-immunisation arguments are easily negated and the medical norm is almost unchallengeable[62] even without a court being able to take judicial notice of the medical benefits of immunisation.

## Best interests

It is clear from the facts of the cases that both parents believe that they are acting in the child's best interests.[63] These are not cases of one or both parents being neglectful in relation to the child's upbringing. Indeed, it may in fact be hypervigilance about the risks to the child's wellbeing that causes the opposition to vaccination of the child.[64] In the case of *Arranzio*,[65] the mother, who 'accepted under cross-examination that, irrespective of any scientific evidence put before her, she will never consent to the child being vaccinated',[66] was described by the Family Report writer as 'a parent who is utterly dedicated to the child's needs to the point of self-sacrifice'.[67] The parents in that case disagreed about almost all aspects of the child's upbringing; in other cases, such as *Kingsford*, 'the question of the immunisation method for the child has become the site for broader parental

60 *Landis v Landis* [2013] FCCA 2413 (17 December 2013).
61 Ibid [91] quoting *Kingsford* [2012] FamCA 889 (19 October 2012) [120].
62 Kath O'Donnell, '*Re C (Welfare of Child: Immunisation)* — Room to Refuse? Immunisation, Welfare and the Role of Parental Decision Making' (2004) 16 *Child and Family Law Quarterly* 213, 217.
63 Eg, in *Kingsford* [2012] FamCA 889 (19 October 2012) [124], Bennett J stated that the mother 'genuinely embraces [homeopathic immunisation] in the child's best interests'.
64 Julie Leask, Harold W Willaby and Jessica Kaufman, 'The Big Picture in Addressing Vaccine Hesitancy' (2014) 10 *Human Vaccines and Immunotherapeutics* 2600.
65 *Arranzio v Moss* [2015] FamCA 544 (17 July 2015).
66 Ibid [202].
67 Ibid [7].

conflict'.[68] Disagreement between the parents in relation to immunisation 'fractures the parental authority'[69] and the decision about routine immunisations becomes subject to a court's determination. That determination is whether it is in the child's best interests to be traditionally immunised. The child's best interests are the paramount consideration.[70] There is no presumption for or against immunisation.

Almost all the cases only consider the individual child's best interests and not wider public policy issues such as the collective best interests of other children in the wider community due to a possible resurgence of childhood diseases.[71] However, in the case of *Rilak & Tsocas*, Loughnan J, when considering the additional considerations under the s 60CC(3) best interests checklist, considered that 'immunisation and the public benefit' could be considered relevant under s 60CC(3)(m), 'any other fact or circumstance that the court thinks is relevant'.[72] He concludes:

> As I indicated earlier in these reasons, while not the paramount consideration, in my view the public benefit of immunisation and the potential benefit to other individuals are factors arguing for the orders sought by the father and on behalf of the child. I will make orders [for the child to receive recommended vaccinations] as proposed on behalf of the child [by the independent children's lawyer] and the father.[73]

The best interests of the individual child in the immunisation cases are usually not considered far beyond their best medical interests.[74] However, in *Randall*,[75] the Court considered the wider impact on the non-vaccinated child of not being able to travel overseas and enrol in holiday activities.[76]

It should be noted that none of the Australian cases have been 'complicated

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68 *Kingsford v Kingsford* [2012] FamCA 889 (19 October 2012) [27].

69 O'Donnell, above n 62, 225.

70 *FLA* s 60CA. This is not to suggest that the best interests principle is in itself unproblematic or easy to determine. A large number of academics have written about the nebulous best interests test including Robert H Mnookin, 'Child-Custody Adjudication: Judicial Functions in the Face of Indeterminacy' (1975) 39 *Law and Contemporary Problems* 226; Elizabeth S Scott and Robert E Emery, 'Gender Politics and Child Custody: The Puzzling Persistence of the Best-Interests Standard' (2014) 77 *Law and Contemporary Problems* 69; John Eekelaar, 'The Interests of the Child and the Child's Wishes: The Role of Dynamic Self-Determinism' (1994) 8 *International Journal of Law, Policy and the Family* 42.

71 See, eg, *Kingsford* [2012] FamCA 889 (19 October 2012) [78] where Bennett J expressly states that she did 'not give public policy considerations [such as herd immunity] any significant weight'. Richard Huxtable, '*Re C (A Child) (Immunisation: Parental Rights)* [2003] EWCA Civ 1148' (2004) 26 *Journal of Social Welfare and Family Law* 69, 74 questions whether the best interests of the individual child should 'form the paramount concern when the good of the public is also in issue'. He considers that there are wider concerns of justice that need to be considered such as the problem of the 'free-rider', unwilling to undergo vaccination, but being reliant on others gaining protection.

72 [2015] FamCA 1235 (13 November 2015) [332]–[335].

73 Ibid [509].

74 In *Kingsford* [2012] FamCA 889 (19 October 2012) [52] the Court did not appear to consider the best interests of the baby half-sister other than to say that the risk to that baby of contracting a fatal infectious disease in Australia was low.

75 *Duke-Randall v Randall* [2014] FamCA 126 (12 March 2014).

76 The Australian cases have not involved consideration of the possible impact of vaccination on a child who is embedded in a cultural community that opposes vaccination.

by the fact'[77] that they involve older children who are themselves strongly opposed to immunisation. The application of the best interests tests to the non-consensual immunisation of a minor would be more complex.[78] The detrimental impact on the emotional wellbeing of the minor might counter the interests in the child being immunised. Any views expressed by the child are an additional consideration in applying the best interests test.[79] To date, the Australian courts do not appear to have been presented with evidence of the child's views in relation to immunisation.[80] In *Randall*,[81] the children were 10 and 12 by the time of the hearing, but there was no mention of whether their views were sought in relation to immunisation. In *Tolbert & Tolbert [No 2]*,[82] the children were 14, 13 and 10. There is a reference in the short ex tempore reasons for judgment to the fact that the 10-year-old cannot be convinced to have a tetanus injection, but there are no more comments in relation to the children's views in the decision to award the father, who is in favour of immunisation, sole parental responsibility in relation to all medical matters. The English case of *F v F*[83] was a case where the children were deeply opposed to being immunised. The judge had met with the 15- and 11-year-old girls, found them 'intelligent, articulate and thoughtful',[84] but still doubted the autonomy of their views when making an order that it was in their best interests to receive the measles, mumps, and rubella ('MMR') vaccination.[85] Even the 15-year-old was found to be too naive to be competent to refuse consent to the preventative MMR vaccination despite the fact that her refusal was based on her vegan principles.[86] The judge considered that her views were influenced by the mother's strong anti-vaccination views.

Even if an order is made for immunisation in the face of opposition from a minor, it would be difficult to find a health practitioner who is willing to carry out a possibly distressing immunisation on a non-cooperative teenager. In addition, the enforcement of any order would be incredibly problematic; it must be questioned whether a court should make an order enforcing immunisation in the face of strong opposition from the minor. As Griffith has written, '[a] court order is no guarantee that the vaccine will be

77 Emma Cave, 'Adolescent Refusal of MMR Inoculation: *F (Mother) v F (Father)*' (2014) 77 *Modern Law Review* 630, 637.

78 Emma Cave, 'Competence and Authority: Adolescent Treatment Refusals for Physical and Mental Health Conditions' (2013) 8 *Contemporary Social Science* 92; Emma Cave and Julie Wallbank, 'Minors' Capacity to Refuse Treatment: A Reply to Gilmore and Herring' (2012) 20 *Medical Law Review* 423.

79 *FLA* s 60CC(3)(a).

80 It is clear from the High Court case of *Bondelmonte v Bondelmonte* (2017) 341 ALR 179 that the court is not required to ensure that children's views are obtained.

81 *Duke-Randall v Randall* [2014] FamCA 126 (12 March 2014).

82 [2016] FamCA 532 (19 May 2016).

83 [2014] 1 FLR 1328.

84 Ibid [6].

85 For a full discussion of that case, see Cave, above n 77; See also Lesley-Anne Barnes Macfarlane, '*F v F*: MMR Vaccine — Welfare Need or Welfare Norm?' (2014) 18 *Edinburgh Law Review* 284.

86 Kirsty L Moreton, 'Gillick Reinstated: Judging Mid-Childhood Competence in Healthcare Law: *An NHS Trust v ABC & A Local Authority* [2014] EWHC 1445 (FAM)' (2015) 23 *Medical Law Review* 303; Cave, above n 77, 637–40 questions the court's finding of naivety of the girls' views.

administered.'[87] Indeed, we know that the deadline in the order for the girls in *F v F* to be vaccinated, passed without the girls having received their vaccinations.[88]

## No Jab, No Pay, No Play — what are the new laws?

### No Jab, No Pay

The history of financial incentives for childhood immunisation in Australia is a shifting one from financial encouragement for general practices to provide immunisations, to financial incentives for parents, to the current No Jab, No Pay laws which could be considered as monetary sanctions for parents who do not fully vaccinate their children.[89]

The first Australian National Immunisation Strategy in 1993 ruled out compulsory vaccination and recommended that conscientious objection be accepted grounds for not vaccinating.[90] The linkage of welfare payments in Australia to vaccination began in 1998; the then federal maternity allowance was linked to immunisation status and was renamed the maternity immunisation allowance ('MIA'). In 2009, the MIA was split into two instalments at the child's ages of 2 and 5 to increase immunisation rates in the later age group. In 2012, family tax benefit ('FTB') Part A was first linked to full childhood immunisation.

However, the major difference introduced by the No Jab, No Pay laws is that prior to January 2016 it was possible for a parent to register what was termed as a 'conscientious objection' to their child being immunised and continue to be eligible for then MIA payments, Commonwealth child care benefits and FTB. As at 31 December 2015, there were 30 092 children with a 'conscientious objection' recorded against their name; this was 1.34 per cent of 0- to 7-year-old Australian children.[91] Since 1 January 2016, conscientious objection (now termed 'vaccination objection')[92] has been removed as a valid

87 Richard Griffith, 'A Court Order Does Not Guarantee That a Child Will Be Immunised' (2017) 25 *British Journal of Midwifery* 128, 129; Richard Griffith, 'What Is Gillick Competence?' (2016) 12 *Human Vaccines and Immunotherapeutics* 244.

88 Nick Paul Taylor, *UK Court Orders Sisters to Receive MMR Vaccine* (15 October 2013) FierceVaccines*; Newton* <http://www.fiercepharma.com/infectious-diseases/u-k-court-orders-sisters-to-receive-mmr-vaccine>.

89 Kirsten Ward, Brynley P Hull and Julie Leask, 'Financial Incentives for Childhood Immunisation — a Unique but Changing Australian Initiative' (2013) 198 *Medical Journal of Australia* 590; Frank H Beard, Julie Leask and Peter B McIntyre, 'No Jab, No Pay and Vaccine Refusal in Australia: The Jury is out' (2017) 206 *Medical Journal of Australia* 381.

90 Beard, Leask and McIntyre, above n 89, 381.

91 Department of Health (Cth), Immunise Australia Program, *AIR — National Vaccine Objection (Conscientious Objection) Data* (8 February 2017) <http://www.immunise.health.gov.au/internet/immunise/publishing.nsf/Content/acir-cons-object-hist.htm>.

92 The term 'vaccination objection' is preferable to the previous 'conscientious objection' for while some objections are based on 'conscience' such as religious, moral or philosophical reasons, many are based on genuine but incorrect beliefs in relation to the safety and efficacy of vaccines, or 'a selfish desire to free-ride on the herd immunity achieved by the vaccinations of others': Steve Clarke, Alberto Giubilini and Mary Jean Walker, 'Conscientious Objection to Vaccination' (2017) 31 *Bioethics* 155. In relation to religious objections to vaccinations, see John D Grabenstein, 'What the World's Religions Teach, Applied to Vaccines and Immune Globulins' (2013) 31 *Vaccine* 2011.

reason for an immunisation exemption. Currently, only families who fully immunise their children, are on a recognised immunisation schedule, or have an approved medical exemption can receive family assistance payments linked to immunisation status such as child care rebate, child care benefit[93] and FTB Part A supplement.[94] These changes have been termed 'No Jab, No Pay' laws. In the 2017 federal budget, the Government put forward proposals to increase the impact of the No Jab, No Pay policies by introducing a No Jab No Pay and Healthy Start for School Compliance Incentive which would reduce the FTB Part A payment by $28 per fortnight for each child who does not meet the immunisation schedules as opposed to just reducing the Part A supplement paid at the end of the year.[95]

## No Jab, No Play

Victoria and Queensland have introduced what are termed No Jab, No Play laws by making amendments to their *Public Health Acts* so that objection is no longer allowed as a ground to permit enrolment of non-vaccinated children in childcare services. The States' amendments are quite different in impact. Queensland allows the service to refuse enrolment of unvaccinated children;[96] while in Victoria, more stringent provisions do not allow enrolment of non-vaccinated children unless they are undergoing a catch-up schedule or have a medical reason not to be vaccinated.[97] Currently in New South Wales, parents with an objection to vaccination may enrol their unvaccinated child in a NSW childcare centre provided they complete the 'Interim vaccination objection form for enrolment in NSW childcare centres' for use in 2017 which

93 *Social Services Legislation Amendment (No Jab, No Pay) Act 2015* (Cth); See *Child Care Benefit (Vaccination Schedules) (Education) Determination 2015* (Cth) for the vaccination schedule requirements to receive Child Care Benefit.

94 See *Family Assistance (Vaccination Schedules) (DSS) Determination 2015* (Cth). *A New Tax System (Family Assistance) Act 1999* (Cth) s 6 sets out when a child will meet the immunisation requirements for the purposes of Child Care Benefit and FTB Part A supplement. It should be noted that s 6(6) states that a child will meet the immunisation requirements if the Secretary so determines. The *Family Assistance (Meeting the Immunisation Requirements) Principles 2015* (Cth) provide, inter alia, that the Secretary may make such a determination if there is a risk that certain persons would be subject to family violence if actions were taken to enable the child to meet the usual immunisation requirements.

95 Christian Porter and Greg Hunt, 'Further Strengthening No Jab, No Pay' (Media Release, 1 May 2017) <http://christianporter.dss.gov.au/media-releases/further-strengthening-no-jab-no-pay>. The changes, if passed, will mean that from the 2018–19 entitlement year, the payment of the FTB Part A supplement will no longer be dependent on meeting immunisation requirements. For further details see Department of Human Services (Cth), *Supporting No Jab No Pay — Healthy Start for School — New Compliance Arrangements - Budget 2017-18* (17 October 2017) <https://www.humanservices.gov.au/corporate/budget/budget-2017-18/families/supporting-no-jab-no-pay-healthy-start-school-new-compliance-arrangements>.

96 *Public Health Act 2005* (Qld) ss 160B, 160C.

97 *Public Health and Wellbeing Act 2008* (Vic) ss 143A, 143B, 143C, 143D. The sections apply to early childhood services licensed under pt 3 of the *Children's Services Act 1996* (Vic). The South Australian Government released a Bill in June 2017, similar in form to the Victorian legislation for public consultation: *Public Health (Immunisation and Early Childhood Care Services) Amendment Bill 2017* (SA). The Bill would introduce fines of up to $30 000 for service providers who enrol or provide services for non-immunised children.

replaces the Commonwealth objection form.[98] The Federal Government proposes to use the Council of Australian Governments ('COAG') process to extend No Jab, No Play laws across Australia.[99] The June 2017 COAG communique noted that the 'existing state-based systems provide a platform for establishing a consistent national approach to immunisation', but did not state which model was preferred; that is mandated exclusion or service-based exclusion. The communique simply stated that the Health and Education Councils would 'develop options to implement a consistent national approach to increase immunisation rates in early education and care services'.[100]

The Government has recently pointed to 2015–16 immunisation figures to herald the recent No Jab initiatives with increasing childhood immunisation rates.[101] However, there are valid debates as to whether the laws are the best way to encourage greater rates of immunisation,[102] particularly given that overall levels of objection between 2002 and 2013 had not changed.[103] It is possible that strongly held views against childhood vaccination will not be changed by the new laws, while the views of hesitant or uncertain parents would be best changed by 'working constructively' with those parents rather than risking punitive measures driving those uncertain parents into the hardcore refusers group.[104] It has been questioned whether the laws violate the human rights of non-vaccinated children.[105] This article does not propose to discuss the merits of the No Jab laws, but rather to consider their possible

98 On 6 April 2017, the shadow Minister for Health introduced the *Public Health Amendment (Vaccination of Children Attending Child Care Facilities) Bill 2017* (NSW) to the Legislative Council which would have the effect of amending the *Public Health Act 2010* (NSW) to remove the objection exemption.

99 COAG, *COAG Meeting Communiqué* (9 June 2017) <https://www.coag.gov.au/meeting-outcomes/coag-meeting-communique-9-june-2017>; Australian Associated Press, 'Malcolm Turnbull Pushes for Ban on Unvaccinated Children at Childcare Centres', *The Guardian* (online), 12 March 2017 <https://www.theguardian.com/australia-news/2017/mar/12/malcolm-turnbull-pushes-for-ban-on-unvaccinated-children-at-childcare-centres>.

100 COAG, above n 99.

101 Australian Institute of Health and Welfare, above n 32; Matthew Doran, 'Vaccination Rates in Children up since 'No Jab, No Pay' Introduced, Federal Government Says', *ABC News* (online), 31 July 2016 <http://www.abc.net.au/news/2016-07-31/government-labels-no-jab,-no-pay-po licy-a-success/7675172>.

102 Julie Leask and Margie Danchin, 'Imposing Penalties for Vaccine Rejection Requires Strong Scrutiny' (2017) 53 *Journal of Paediatrics and Child Health* 439; Leask, Willaby and Kaufman, above n 64; Stephen S Holden, '"No Jab, No Pay" Policy Has a Serious Ethical Sting', *The Conversation*, 15 April 2016 <https://theconversation.com/no-jab-no-pay-policy-has-a-serious-ethical-sting-40078>; C Raina MacIntyre, *Punishing Parents Who Refuse Vaccination by Withdrawing Government Benefits — Is It Effective Public Health?* (7 April 2015) University of New South Wales Sydney <https://sphcm.med.unsw.edu.au/infectious-diseases-blog/punishing-parents-who-refuse-vaccination-withdrawing-government-benefits-%E2%8 0%93>.

103 Frank H Beard et al, 'Trends and Patterns in Vaccination Objection, Australia, 2002–2013' (2016) 204 *Medical Journal of Australia* 275 <https://www.mja.com.au/journal/2016/204/7/trends-and-patterns-vaccination-objection-australia-2002-2013>. Beard et al considered that any increase in *registered* objections during that time may have been driven by increased awareness that registration preserved eligibility for family assistance payments.

104 Daniel A Salmon, C Raina MacIntyre and Saad B Omer, 'Making Mandatory Vaccination Truly Compulsory: Well Intentioned but Ill Conceived' (2015) 15 *ScienceDirect* 872; MacIntyre, above n 102.

105 Paula Gerber, 'The Ethics of Enforced Child Vaccinations', *Crikey*, 23 May 2013 <https://www.crikey.com.au/2013/05/23/the-ethics-of-enforced-child-vaccinations/>.

impact on Family Law Court proceedings.

## Which parents will be particularly affected by the No Jab laws?

The No Jab, No Pay Commonwealth legislation will have its greatest impact on families claiming child care benefit, child care rebate and the FTB Part A end-of-year supplement where at least one parent had previously registered an objection to the child being vaccinated. Prior to January 2016, such families could have received the FTB Part A supplement at the end of the financial year together with child care benefit and child care rebate if a child was in child care, in addition to other income and tax benefit supports. However, this is no longer the case unless vaccination occurs or a catch-up schedule is implemented.[106] It has been estimated that withholding child care and family tax benefits could cost immunisation non-compliant parents up to $15 000 per year per child.[107] The laws will generally have a greater impact on families on lower incomes because both child care benefit and FTB Part A are income tested. In combination, the No Jab, No Pay and No Jab, No Play will result in reduced access to childcare for some families.

### Family Tax Benefit Part A

In the 2015–16 financial tax year, 134 372 FTB Part A children missed out on part, or all the supplement because they did not meet the full year immunisation requirements. This was 5.2 per cent of children whose parents were eligible for FTB Part A supplement. With the implementation of lower income thresholds for Part A supplement eligibility from April 2017, the proportion of families affected by the removal of the objection exception in relation to receipt of FTB supplement will decrease in the next financial year.[108] Research suggests that children with a registered objection tend to be clustered in areas in the highest socio-economic decile whereas children whose parents are not ideologically opposed to immunisation but have logistical or practical reasons for not vaccinating tend to be clustered in areas in the lowest socio-economic decile.[109] The latter group will be those mostly

106 The Australian Vaccination-Skeptics Network website is collecting stories from families who state that they have been adversely affected by No Jab, No Pay/Play laws. See Australian Vaccination-Skeptics Network, *More Stories from Families Adversely Affected by No Jab No Pay/Play* (13 March 2016) <https://avn.org.au/2016/03/stories-families-adversely-affected-no-jab-no-payplay/>.

107 'Vaccination to Be Backed by Welfare Sanctions', *The Australian*, 12 April 2015 <http://at.theaustralian.com.au/link/6337528471b2b26bd2a5511602bd6903?domain=theaustralian.com.au>; Leask and Danchin, above n 102; Holden, above n 102.

108 From April 2017, FTB Part A supplements will be available to fewer families and will be paid at a reduced level than previously — families with a combined household taxable income over $80 000 per year will lose their FTB Part A supplement, and there has also been a freeze of the indexation of FTB rates for 2 years: *Social Services Legislation Amendment Act 2017* (Cth).

109 Beard et al, above n 103. Beard et al note that incomplete vaccination, where there is no recorded objection, has been associated with socio-economic factors in early Australian and overseas studies. This suggests that delayed vaccination, as opposed to objection to vaccination, may be caused by problems related to disadvantage, logistic difficulties, and

impacted by the FTB changes, and arguably, the group that will be incentivised to immunise their child. However, if the proposed budget measures are passed, the new No Jab No Pay and Healthy Start for School Compliance Incentive[110] would mean that from 1 July 2018, *all* families eligible for FTB Part A, *regardless of income*, would be subject to the new immunisation requirements — thus impacting on both high and low income families.[111]

## Child care benefits

Child care benefit is income tested and is usually paid direct to the approved or registered childcare service to reduce the childcare fees paid by parents. Combined family income limits before the child care benefit is not paid are relatively high compared to FTB limits.[112] Child care rebate is not means tested: even if family income is too high to receive the child care benefit, parents are still eligible for rebate which covers up to 50 per cent of out-of-pocket costs, up to $7500 per year. Therefore, the No Jab No Pay changes in relation to child care benefits will catch a wide income range of families if they are using childcare services which may include before- and after-school care, vacation care and holiday programs for school-aged children.

## No Jab, No Play

Currently, the No Jab No Play laws particularly impact upon Victorian parents who would have previously registered an objection to their child being immunised and who wish to use childcare services. Reports suggest that, despite having the ability to exclude unvaccinated children, most Queensland childcare providers have not taken that option.[113] However, if national measures are introduced then, depending on the model introduced,[114] many more families will be impacted.[115]

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access to health services. See: Lyndal Bond, Terry Nolan and Rosemary Lester, 'Immunisation Uptake, Services Required and Government Incentives for Users of Formal Day Care' (1999) 23 *Australian and New Zealand Journal of Public Health* 368; Matthew E Falagas and Effie Zarkadoulia, 'Factors Associated with Suboptimal Compliance to Vaccinations in Children in Developed Countries: A Systematic Review' (2008) 24 *Current Medical Research and Opinion* 1719.

110 Department of Human Services (Cth), above n 95.

111 Income limits to receive FTB Part A (as opposed to the supplement) are relatively high. For example, where there is one child of 0–12 years and 1 child of 13–15 years, the adjusted annual taxable income limit is $107 785; and where there are three children of 0–12 years and one of 13–15, the income limit is $156 366. See Department of Human Services (Cth), *Income Test for Family Tax Benefit Part A* <https://www.humanservices.gov.au/customer/enablers/income-test-family-tax-benefit-part#a3>. In 2014, the National Commission of Audit reported that, '[j]ust under 70 per cent of families with children under 16 (around 1.9 million families) receive FTB-A'; National Commission of Audit, 'Towards Responsible Government: Phase One' (Report, February 2014) ch 7.

112 Eg, the income limit before payment reduces to $0 is $154 697 where there is one child attending an approved childcare service or $181 024, plus $34 237 for each child after the third, for three children or more. Maximum rate of child care benefit is payable for families with an annual income of less than $44 457.

113 Jorge Branco, 'Queensland "No Jab, No Play" Childcare Laws Short on Impact', *Brisbane Times* (online), 21 February 2016 <http://www.brisbanetimes.com.au/queensland/queens

## Impact of No Jab laws on Family Court litigation

The No Jab laws could have profound ramifications on the lives of parents and hence on Family Court dynamics.[116] Where parents have separated, the parents are assessed as two separate families for child care benefit purposes so that benefits are paid to a service on behalf of the parent liable for the cost of care for the child. If one parent is refusing to immunise the child, then both parents will be unable to claim child care benefit even if the parent responsible for the childcare payments wants the child to be immunised.

The main reason children attend formal care is to enable parents to work.[117] The eligibility of a parent for childcare payments will directly affect a parent's ability to undertake full-time or even part-time work. This is if the parent is even able to enrol the child in suitable childcare services if No Jab, No Play laws apply in their state. If enrolment in child care becomes impossible, this obviously impacts on a parent's ability to work or, if the parents are in a shared care arrangement, to be able to care for the child. It will also impact on a child's participation in early childhood education, an experience which can provide 'social and learning opportunities for children.'[118]

The situation in relation to FTB will vary depending on the care arrangements for the child.[119] Both parents may be eligible for FTB for a child at the same time, provided that each parent cares for the child between 35 per cent and 65 per cent of the time. If one parent does not have care of the child for at least 35 per cent of the time, then FTB is only paid to the primary carer.[120] However, neither parent will be able to receive the relevant FTB payment if the child has not been immunised and there is no approved medical exemption for that non-immunisation.

The No Jab laws have the potential to result in increased litigation over routine childhood immunisations in the Family Law Courts.[121] If, in the past, one parent had been an objector to immunisation, then the other parent may have agreed to the child not being immunised either because they agreed with

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land-no-jab-no-play-childcare-laws-short-on-impact-20160221-gmzrnq.html>; Jon Coghill, 'Queensland Childcare Centres Still Accepting Unvaccinated Children despite New Laws', *ABC News* (online), 18 March 2016) <http://www.abc.net.au/news/2016-03-18/qld-childcare-centres-still-accepting-unvaccinated-children/7256964>.

114 See above, the text to n 100.

115 Approximately 72 per cent of Australian parents are in favour of non-vaccinated children being excluded from childcare: Anthea Rhodes, 'Vaccination: Perspectives of Australian Parents' (Report, The Royal Children's Hospital Melbourne, 8 March 2017) <https://www.child healthpoll.org.au/wp-content/uploads/2017/03/ACHP-Poll6_Detailed-report_FINAL.pdf>.

116 This article does not consider the impact of one party objecting to immunisation on financial disputes in the Family Law Courts. If such an objection reduces the earning capacity and eligibility to benefits of the other party, this could possibly be a relevant factor under *FLA* s 79.

117 Jennifer Baxter, 'Child Care and Early Childhood Education in Australia' (Facts Sheet, Australian Institute of Family Studies, 2015).

118 Ibid 12.

119 *A New Tax System (Family Assistance) Act 1999* s 22 defines a FTB child.

120 Ibid s 22(7).

121 Amy Jenkins, 'Families, Courts May Suffer under Vaccination Laws', *ABC News* (online), 18 August 2015 <http://www.abc.net.au/news/2015-08-18/jenkins-families,-courts-may-suffer-under-vaccination-laws/6704792>.

the objection, or to avoid acrimony and possible litigation. For example, in the case of *Randall*[122] the father stated that, 'during the marriage he had agreed with the mother's anti-vaccination view for the sake of peace in the household'.[123] After separation, he had 'not previously acted in respect of immunising the children because of the mother's strong views against immunisation',[124] but he became more determined to vaccinate the children once the impact of non-immunisation became more apparent: the children could not be enrolled in certain holiday activities, their school had asked him to complete a conscientious objection form but he was not a conscientious objector, and he did not think it was safe for the children to travel to certain overseas destinations without vaccination.

After the No Jab laws, the stakes are further increased. Not only are the health, extracurricular activities and overseas travel of the child in question, but possibly, depending on the care arrangements for the child, so is the ability of the parent to work, to receive substantial financial benefits and of the child to access childcare services. A refusal to consent to immunisation of a child provides a parent with a potential debilitative power over the other parent's life. If the dispute is such that litigation must be commenced in relation to immunisation, a very long wait may be required before a case is resolved.[125] In the meantime, both parents, including the parent who is in favour of immunising the child, will be left without financial benefits and access to child care.[126] It is possible that unilateral action by the parent in favour of immunisation will be more likely after the No Jab laws' introduction if that parent has a Medicare card for the child and so can arrange the child's immunisations without the other parent's knowledge.

The dynamics of the cases will also change. The No Jab laws, although they are not akin to compulsory childhood vaccination, are an effort to regulate, or even coerce, the behaviour of parents in relation to their child, even in intact families. Certainly, it is still true to say in Australia, that '[i]n an intact family, parents have considerable latitude regarding their children and their upbringing.'[127] However, the normative and cumulative effect of the No Jab laws in favour of immunisation for all children, regardless of the parenting arrangements, will surely impact upon the best interests decisions in future

122 *Duke-Randall v Randall* [2014] FamCA 126 (12 March 2014); similarly, the father in *Malik & Malik* [2016] FamCA 473 10 June 2016 [310] had signed a vaccination objection form for the child while he was with the mother because of her strong views. However, he now wanted the child immunised, particularly due to the child being asthmatic.

123 *Randall* [2014] FamCA 126 (12 March 2014) [106].

124 Ibid [141].

125 The Honourable Chief Justice Diana Bryant commented in the December 2016 issue of the *Family Court Bulletin* that 'current waiting periods to have a matter heard are beyond acceptable': Diana Bryant, 'From the Chief Justice' (2016) 19 *Family Court Bulletin* 3 <http://www.familycourt.gov.au/wps/wcm/connect/fcoaweb/reports-and-publications/bulletin/bulletin-19/>.

126 The party affected could theoretically apply for expedition of the matter. Any such application would turn not just on its merits, but a consideration of whether priority should be given to this case to the possible detriment of other cases; see *FLR* r 12.10A.

127 Archana Parashar and Francesca Dominello, *The Family in Law* (Cambridge University Press, 2017) 266; For an argument that joint parental decisions against vaccinating their child should be overridden in certain situations, see Angus Dawson, 'The Determination of the Best Interests in Relation to Childhood Vaccinations' (2005) 19 *Bioethics* 188.

Family Law Court cases. In cases where parents are not united, the parent in favour of immunising the child will not only introduce orthodox medical evidence in relation to the child's best interests, but will also introduce evidence of the normative values and impact, if any, of No Jab laws. For example, it is not necessary to agree with the laws to assert that the child's best interests will be served by them having the opportunity to attend child care and for the financial assistance available to the family being maximised. The No Jab laws may also mean that, if unilateral action arranging a child's vaccination is taken by a parent, then even if this is carried out when parenting orders are in place, the presence of the strong norm-creating message in favour of immunisation from the No Jab laws will mean that court disapproval of that action is muted. As discussed, it is already very rare for a Family Law Court to make an order that does not result in the child being vaccinated according to NIP. It is suggested that the laws will be another 'push' for the Court to make an order in favour of traditional immunisation.

## Conclusion

The likely outcome of immunisation disputes in the Family Law Courts would appear to be that the child will be immunised according to NIP, unless there are clear medical counterindications for the particular child.[128] This article has argued that this outcome is even more likely after the No Jab laws: the cumulative effect of the No Jab laws will impact upon best interests decisions. Without strong expert evidence about the medical best interests of the child concerned, parties should be advised to settle these matters and not proceed to lengthy and expensive litigation.[129] However, some parents have such strongly held views and mistrust of healthcare providers and government motives that neither No Jab laws nor possible Family Law Court proceedings will change their views, and indeed, may even entrench them further.[130] The deeply entrenched views of parties in these cases may still result in immunisation disputes in the Family Law Courts, contrary to legal advice in the case of a parent opposed to immunisation.

128 In one of the few cases where an order for vaccination was not made immediately, *Mains* (2011) 46 Fam LR 400 further medical evidence was introduced at the appeal by both parties and the matter was remitted for rehearing before a Federal Magistrate who would have the benefit of further tests carried out on the children before making a decision.

129 In *Arranzio* [2015] FamCA 544 (17 July 2015), the hearing in relation to immunisation took place in May 2014 and judgment was delivered in July 2015. Parenting applications were first filed in that case in 2010.

130 McIntyre, Williams and Leask, above n 10.