DIVORCED ...with children

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No fault divorce promised an end to bitterness; but has the bitterness simply moved to custody disputes?

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The introduction of the *Family Law Act* (the *FLA*) in 1975 heralded a landmark reform. In the second reading speech for the Bill, Senator Murphy noted that the Bill was intended to enable the parties to separate with 'maximum fairness and the minimum bitterness, distress and humiliation'. It was a Bill 'to remove oppressive costs, delays, indignities and other injustices'. Some 20 years later in releasing the Government's response to the 'Report of the Joint Select Committee into Certain Aspects of the Operation and Interpretation of the Family Law Act', the Attorney-General stated that:

> [t]he introduction of no-fault divorce in 1975 was a landmark reform . . . Although the Family Law Act was a great improvement on the system it replaced, the vision of simplicity and affordability was never fully realised.[1]

This article examines the vision in 1975 and traces the history of the changes to the *FLA* during the 20 years of its operation to see how that vision has developed. Was that vision ever attainable or is it simply a utopian dream in an area of the law which will always be characterised by bitterness and acrimony using whatever means are at the disposal of the parties to win a war?

The amendments to the *FLA* over the past 20 years have principally dealt with children's issues. The changes in this time have concentrated on uniformity of coverage for children throughout Australia and in so doing have avoided the difficult issue of how legislation should address the emotional and social cost of separation. Having a uniform set of rules is of little assistance unless those rules take account of the emotional trauma that is endemic in this area of the law. The most recent changes to the *FLA*, currently before Parliament, are a step in the right direction in addressing this issue.

What was the 1975 Act meant to achieve?

The system established in 1975 was to be one which allowed separating couples to go their separate ways with as much dignity as possible and with the minimum of distress. Senator Murphy, in introducing the legislation, argued that the law in 1975 was out of step with societal attitudes and he saw the establishment of the *FLA* and the Family Court as an essential social reform.

The *FLA* was revolutionary in introducing no fault divorce. The inquiry into fault for the dissolution of marriage was said to 'involve indignity and humiliation to the parties'. The second reading speech provides the history:

> The evidence put before the Senate Committee on Constitutional and Legal Affairs fortified me in the view that the grounds of divorce based on the principle of matrimonial fault should be removed and replaced by a single ground of divorce — breakdown of marriage. I also reached the conclusion that an inquiry into the cause of breakdown was not proper and that it would be sufficient if the person seeking the divorce were to prove that the parties had separated and had lived separately and apart for period of not less than one year. This, then, is the sole ground of divorce under the Bill.[2]

The Family Court would be a helping court, with counselling as an integral part of the Court. As far as children were concerned, the *FLA* established that the welfare of the child would be the paramount consideration.

Constitutional challenges to the *FLA*

The *FLA* relies largely on s.51(xxi) (the marriage power) and s.51(xxii) (the divorce and matrimonial causes power) of the Constitution. Predictably, the first High Court constitutional challenge, *Russell v Russell; Farrelly v Farrelly* (1976) 134 CLR 495, came shortly after the Act commenced operation. One of the important issues canvassed in this case was whether the Commonwealth could make a law which permitted the Family Court to hear ancillary applications such as actions for maintenance, custody and alteration of property interests without there being an application for principal relief, for example, a decree of dissolution, as had been required under the *Matrimonial Causes Act 1959*.

In *Attorney-General for the State of Victoria v The Commonwealth* (1962) 107 CLR 529 (the *Marriage Act* case) it was established that the power conferred by s.5(xxi) should not be narrowly construed and that the power under this head was not confined to making laws with respect to the celebration of marriage. The majority of the High Court was in no doubt that the exercise of the marriage power enabled the Parliament to create a jurisdiction which included the matters set out in the divorce and matrimonial causes power, namely, parental rights, custody and guardianship of infants.

The 1983 amendments

In 1980, the Parliamentary Joint Select Committee recommended that the *FLA* be amended 'to the fullest extent possible within the jurisdictional limits of the powers of the Commonwealth to ensure that the Family Court has jurisdiction in all matters affecting custody, guardianship and access to a child'.[3] The Constitutional Convention in Adelaide in 1983, much to the annoyance of Senator Evans, the Attorney-General at the time, did not support a constitutional amendment to cure the jurisdictional problems in family law cases relating to the custody of children.

The 1983 amendments to give effect to the Committee's 1980 recommendation, like much of the legislation in the reform of family law — the current reforms being no exception — had a lengthy gestation period. As well as clarifying the concepts of custody and guardianship under the *FLA*, the *Family Law Amendment Act 1983* made two significant changes. It allowed third parties to institute proceedings without primary proceedings being instituted by the parents and it included a 'welfare power' in the *FLA*.

Third party proceedings

The issue of third party proceedings did not have to wait long before a High Court challenge was instituted. In *V v V* (1985) FLC 91-616, a grandmother made application for access to her two grandchildren who had been legally adopted by her son and his wife. The constitutional validity of the new paragraph (ce) of 'matrimonial cause' was squarely raised on the facts of the case. The High Court found that the provision allowing third party applications was valid. Further, the Court went on to say that it was not necessary for there to have been proceedings between the parties before an action could be commenced. The marriage power supported legislation which provided for proceedings dealing with 'conflicting claims by a party to a marriage and a stranger to the custody of or access to a child of the marriage'.

Welfare power

The welfare power, on the other hand, has only recently been brought to prominence through the applications for consent to sterilisation of minors, such as was the case in *Secretary, Department of Health and Community Services v JWB and SMB* (*Marion's* case) (1992) 175 CLR 218. As was held in *P v P* (1994) 120 ALR 545, the jurisdiction of the Family Court in this area extends to all children of a marriage and there is no requirement to comply with State law should it prescribe matters to be satisfied before surgery is undertaken. Consent of the Family Court is sufficient. The question as to whether this jurisdiction extends to ex-nuptial children is not settled.

Ex-nuptial children

A more adventurous extension of the jurisdiction contained in the 1983 amendments was the re-definition of a 'child of the marriage' (paragraph 5(1)(f) of the *FLA*) to include ex-nuptial children who were 'treated by the husband and wife as a child of their family if, at the relevant time, the child was ordinarily a member of the household of the husband and wife'. This provision was tested in *Cormick v Salmon* (1984) FLC 91-554.

In *Cormick v Salmon* the child was an ex-nuptial child whose maternal grandmother had raised the child as part of her household. The grandmother applied for custody and argued that the child was a child of the marriage by virtue of the new paragraph 5(1)(f) in the *FLA*. The High Court found that this extended definition of child of a marriage could not be justified on the marriage power. The Commonwealth did not have the constitutional power to make a law in relation to ex-nuptial children and it was not until the States referred to the Commonwealth the power to make such laws that it had constitutional validity.

Constitutional Commission proposals

The Constitutional Commission was established in December 1985 as part of a broad ranging review of the Constitution. It examined the division of power between the Commonwealth and States in relation to a number of matters including matters affecting families. The Commission did not recommend that the Commonwealth have a head of power to make laws with respect to families concluding that the term 'family' was too imprecise.[4] The Commission saw the public/private distinction as a rational basis for the division of legislative power and recommended that the Commonwealth responsibility cover:

- custody and guardianship of all children, but without affecting the continued exercise of State authority over child welfare;
- maintenance of all children;
- adoption;
- determination of parentage and legal status of all children;
- property and financial disputes between parties to a *de facto* marriage.

The Commission recognised that this expansion could be achieved by a constitutional amendment with a referral of power being another option. A referendum on this matter was never put but, as the Commission recognised at the time of its report, four of the six States had referred power in relation to the first two items on the Commission's list.

References from the States

In 1987, the *FLA* underwent further amendment. The 1987 amendments represent an important step in the process of achieving uniformity in family law. These amendments saw a complete re-write of Part VII after four of the six States referred to the Commonwealth power to legislate in relation to the custody, access, guardianship and maintenance of children as well as payment of expenses in relation to child-bearing. The reference was given by New South Wales, Victoria, South Australia and Tasmania and in 1990 the same reference was given by Queensland. Western Australia remains the only State not to refer the matters.

The effect of these references meant that Commonwealth law, through the *FLA*, applied to all children whether the child was a child of the marriage or an ex-nuptial child, except if a State or Territory welfare order or arrangement was in place. The then Attorney-General, Lionel Bowen, expressed regret that not all States had referred power leaving a patchwork of jurisdiction over children.

Two other areas where agreement has been reached concerning uniformity of law are presumptions of parentage and determination of parentage. The Standing Committee of Attorneys-General agreed in July 1991 that the Commonwealth and States and Territories would enact uniform presumptions of parentage, that the law governing the determination of parentage would also be uniform and the States would refer to the Commonwealth the power to make laws with respect to a declaration of parentage for Commonwealth purposes.

Prior to amendments made to the *FLA* in 1987, third parties could seek orders with respect to custody, access, guardianship or maintenance where one of the parties to a marriage was also a party to proceedings. In addition, proceedings for the welfare of a child could be undertaken where one of the parties to the marriage was a party to the proceedings. This was achieved through the drafting of the definition of 'matrimonial cause'. These paragraphs of the definition were removed by the 1987 amendments and a much simpler rule inserted. Any person interested in the welfare of the child could commence proceedings under the *FLA*.

Child support

One of the most significant changes on the family law landscape after the reference of power to the Commonwealth in 1987 was the way that maintenance was dealt with. The reference of power provided the constitutional basis for a child support scheme to apply to all children. The Child Support Scheme was divided into two stages. Stage 1 is court-ordered maintenance under the *FLA* and stage 2 is child support calculated under the formula contained in the *Child Support (Assessment) Act 1989*. Liabilities in relation to either stage 1 or stage 2 children may be registered with the Child Support Agency for collection under the *Child Support (Registration and Collection) Act 1988*.

The Child Support Scheme has recently been reviewed by the Joint Select Committee into Certain Family Law Issues. Its report, tabled in December 1994, makes 163 recommendations for change. The report covers a range of administrative changes, as well as canvassing the components and bases for the formula and its application.

Changing approach to children

The changes to the *FLA* up to this time were principally aimed at achieving a more uniform set of rules governing children. But even though the rules were more uniform, there was still a problem with children being used by some separating couples to get at their former spouse. The *FLA* had started to explore ways to deal with the issue by mandatory reporting of child abuse but it had not taken the issue on directly. It was, however, being discussed in the case law.

In 1991, the Family Court decided the important case of *In the Marriage of Brown and Pedersen* (1991) 15 Fam LR 173. The decision signalled the trend in the way the Court was dealing with children's matters and was reflective of the changes that were about to emerge from the Joint Select Committee inquiry and the subsequent legislative change currently before the Parliament. *Brown and Pedersen* held that access is not the right of the parent but that decisions which affect matters such as access should be made so that the welfare of the child is the paramount consideration, a matter which now sees legislative expression in the *Family Law Reform Bill 1994*.

However, *Brown and Pedersen* is also important for what it says about another trend in decision making about children that has yet to be fully explored. In commenting on the need to maintain a filial relationship with both parents, the Full Court in *Brown and Pedersen* endorsed the remarks of the High Court in *M v M* (1988) 166 CLR 69 (at 76) where it said

> . . . proceedings for custody or access are not to be viewed as *adversary* proceedings in the ordinary sense, but as an *investigation* of what order will best promote the welfare of the child. [at 184, emphasis added]

Brown and Pedersen clearly stated that the welfare of the child is the paramount consideration and the Court is required to make an independent investigation of what the welfare of the child requires. However, the Court is restricted to a degree in carrying out such an investigation. First, it is a Chapter III court which is bound under the Constitution to act judicially. It is to decide disputes between parties according to the evidence presented to it. Second, there is little by way of amendment to the traditional rules of evidence. The Court is able to admit some hearsay evidence, and to hear evidence of reports of counsellors and welfare officers or to interview a child in chambers. These assist the Court in making its decision, but do not address the main issue of the Court being able to conduct an investigation into the welfare of the child.

The latest changes

The package of reforms currently before Parliament differs from amendments made over the previous 20 years in that it does not seek to increase the coverage of the *FLA*. Rather the current reforms address issues arising out of Murphy's original vision of a family law system which allowed separation to proceed with minimum bitterness, distress and humiliation and, where children were involved, that their welfare would be the paramount consideration.

The *Family Law Reform Bill 1994* (the Reform Bill) was introduced into Federal Parliament on 13 October 1994, after an earlier version was withdrawn subsequent to consultative processes. It is the first stage of the reforms described by the Attorney-General as the most far reaching reform since the introduction of the *FLA* in 1975. The changes arise out of the Government response (December 1993) to the Report by the Joint Select Committee into Certain Aspects of the Operation and Interpretation of the Family Law Act[5] and the subsequent letter of advice provided to the Attorney-General by the Family Law Council on the Operation of the Children Act 1989 (UK).[6]

The focus of the amendments in the Reform Bill is two-fold. First, the Bill expands the availability of dispute resolution procedures involving mediation and counselling. The second focus is on Part VII (Children) of the *FLA*. Reminiscent of the amendments in 1987, Part VII has been redrafted entirely and it replaces the current concepts of custody, access and guardianship with a statutory concept called 'parental responsibility'.

Primary dispute resolution

The use of primary dispute resolution processes is encouraged under the Reform Bill but is not mandatory prior to seeking a court order. Proceedings in the Court may be instituted at any time regardless of whether any of the primary dispute resolution mechanisms have been commenced. Under cl.4 of the Reform Bill marriage counselling becomes a subset of a much broader category of counselling — family and child counselling, which also includes child counselling and any other counselling that arises in proceedings under the Act, within constitutional limits (for example, the most notable constitutional exclusion is the counselling of *de facto* couples).

Mediation, under s.4 of the *FLA* as it currently stands, is conducted by 'approved mediators'. An approved mediator is one approved by the Chief Justice of the Family Court. In practice, this statutory scheme for mediation has meant that only court mediation is approved under the *Family Law Act* and other mediation, not being approved, does not attract the protection and immunities provided under the Act.[7]

Under the Reform Bill, the court mediation system remains. However, mediation is significantly expanded to include the following:

- court mediator — equivalent to an approved mediator under the regulations;
- person authorised by an approved mediation organisation — the organisation is approved by the Attorney-General and authorises people to undertake mediation on the organisation's behalf; or
- private mediator — a person who offers mediation in accordance with the regulations.

New s.19N which makes any admissions made to a mediator and evidence of anything said to a mediator not admissible in a court applies to all classes of mediator. In addition, s.19M is amended to extend the same protection and immunity as a judge of the Family Court to all mediators under the *FLA*.

Children

By far the most significant component of the Reform Bill is the replacement of Part VII of the *FLA* with a completely new Part. The new Part is based on the concepts and terminology recommended by the Family Law Council in its letter of advice on the operation of the *Children Act 1989* (UK).[8] The Bill replaces the concept of custody and its companion notion of access and also replaces the guardianship responsibilities currently conferred on parents (in s.63F of the *FLA*) with the concept of 'parental responsibility'. The concept of custody especially has carried with it notions of ownership of children and in some cases has tended to lead to the belief that the child is a possession of the parent who is granted custody, to do with as that parent pleases, including making the child available for access when that person pleases, despite court orders to the contrary.

The Bill will enact provisions which give parents 'parental responsibility'. This is defined as all the duties, powers, responsibilities and authority which by law parents have in relation to children (proposed s.61B of the Reform Bill). Parents will no longer be the statutory guardians of the child but will have parental responsibility conferred upon them. It is important to note that the concept of parental responsibility has been drafted to avoid the mention of any 'rights' of the parents in respect of the child. There is, for example, no longer reference to a right of custody or a right of access. Rather parents have a duty to discharge the obligation of parental responsibility in the best interests of the child. The Bill also makes it clear that parental responsibility is not dependent on whether the parents are married or separated or whether they have never married or lived together (proposed s.61C of the Reform Bill).

Consistent with the object to encourage parents to take on greater responsibility for their ongoing parenting responsibility, the Bill provides that parents may agree on a parenting plan (s.63B of the Reform Bill). Parents are directed, in reaching their agreed plan, to regard the best interests of the child as the paramount consideration. When coupled with the provisions dealing with primary dispute resolution, the signals given to parties by the Reform Bill are for an outcome arrived at with the assistance of a counsellor or one that is determined by the parties through mediation.

A significant departure from the current Part VII that is made in the Reform Bill concerns the type of orders the Court may make. The general order for the care, welfare or development of the child will be known as a parenting order, so called to emphasise it is an order dealing with all aspects of the parenting of the child. It has a number of components:

- residence: stating who is to provide residence for the child;
- contact: stating who may have contact with the child;
- maintenance: stating who (and the amount) is to pay maintenance for the child (stage 1 of the Child Support Scheme);
- specific issues: stating any other matter that the court may include in the order. For example it may be an order for the day-to-day care, welfare and development of the child or an order for the long-term care welfare and development of the child.

The Court may make a parenting order dealing with any or all of the constituent parts mentioned above. A parenting order may be applied for by either or both the parents, the child or any other person concerned with the care, welfare or development of the child (proposed s.65C of the Reform Bill). The Court is expressly given a general power to make orders and in so doing must regard the best interests of the child as the paramount consideration (proposed ss.65D and 65E of the Reform Bill).

Conclusion

The enactment of the *Family Law Act* in 1975 was revolutionary in introducing no fault divorce. The reform was introduced to reflect the changes in community attitudes at the time. However, much of the hurt and anxiety that was played out in the divorce proceedings was transferred to the proceedings involving children. The answer the legislature saw to this was to establish the Family Court as a helping court complete with a counselling service. It also provided that the principle governing children's matter would be, and remains, the welfare of the child as the paramount consideration.

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provides an uncompelling critique. The seriousness of the problems at which racial hatred laws are directed does not justify a ban on critical judgment — it demands well-considered and constructive analysis. The required analysis must include consideration of the practical operation of existing racial vilification laws, drawing on all available sources of information. Future decisions of the New South Wales Equal Opportunity Tribunal will be a valuable source of information, providing much-needed context for an important debate.

References

1. For example, (1994) 1 *Australian Journal of Human Rights*, which contains a 'Symposium on Racial Vilification'.
2. *Anti-Discrimination Act 1977* (NSW), ss.20C-20D (amended in 1989); *Discrimination Act 1991* (ACT), ss.66-67; *Criminal Code 1913* (WA), ss.77-80 (amended in 1990); *Anti-Discrimination Act 1991* (Qld), s.126.
3. *The Racial and Religious Vilification Bill*, introduced by the then Labor Government in Victoria in 1992, has not be supported by the current Coalition Government.
4. See *Australian Capital Television Pty Ltd v Commonwealth* (1992) 177 CLR 106; *Nationwide News Pty Ltd v Wills* (1992) 108 ALR 68; and *Cunliffe v Commonwealth* (1994) 124 ALR 120.
5. A pamphlet titled, *The Old Digger On His Soapbox*, recently circulated by the Federal Coalition as part of its opposition to the proposed national legislation, is a good example: see B. Jones, 'Libs "crude" on hate bill', *Sun-Herald*, 28.5.95, p.28.
6. *Wagga Wagga Aboriginal Action Group v Eldridge* (1995) EOC 92-701.
7. In *Harou-Sourdon v TCN Channel Nine Pty Ltd* (1994) EOC 92-604, the Equal Opportunity Tribunal considered a complaint based on comments by Clive Robertson during a television program in 1990 which were alleged to constitute racial vilification of persons of French origin. The complaint was dismissed under s.111(1) of the *Anti-Discrimination Act 1977* (NSW) on the basis that it was misconceived and lacking in substance.
8. The Tribunal relied specifically on the decision of the New South Wales Court of Appeal in *Ballina Shire Council v Ringland* (1994) 33 NSWLR 680.
9. Human Rights and Equal Opportunity Commission (HREOC), *Racist Violence: Report of National Inquiry into Racist Violence in Australia*, AGPS, 1991.
10. HREOC, above, p.387.

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The amendments to the *FLA* over the past 20 years have done little to address the problem in the conduct of children's proceedings. The changes to the *FLA* have seen a march towards uniformity for children's issues. This is without a doubt desirable. But the problem of taking the heat out of children's proceedings cannot be solved simply by changing the legal formulas contained in the *FLA*. It needs a much more sophisticated response.

There needs to be a shift in attitudes so that solutions are found in the interests of the child rather than the interests of the parents. The *FLA* is now starting to play a different role than it has played in the past. The change in concepts and terminology and the emphasis on mediation means that the *FLA* is taking a lead in effecting the attitudinal shift. It is no longer simply reflecting attitudes.

But it would be a mistake to see the *FLA* in isolation. There is no doubt that legislation is important in changing attitudes and influencing behaviour. However, it has its limitations. In 1975, the legislature enacted s.14 requiring both the Court and practitioners to consider reconciliation of the parties at 'every point'. However, it is also accepted that lawyers trained in the adversarial mode of dispute resolution are not necessarily attuned to signals of reconciliation. Indeed, s.14 is a prime example of the limitation of legislation influencing attitudes. We have a blunt tool in legislative change to influence changes in behaviour and the impact may not be immediately apparent.

The family law system has a number of components, each having an important part to play in the overall system. The legislation is but one of those components. On its own we cannot hope that it will shift community attitudes unless we see change in the other elements of the system through judicial education and education of the legal profession and others such as counsellors and mediators.

References

1. Press release by the Attorney-General, 16 December 1993.
2. Senator Murphy, Second Reading Speech, Senate 3 April 1974, p.641.
3. *Family Law in Australia — A Report of the Joint Select Committee on the Family Law Act*, AGPS, July 1980, Vol.1, p.62.
4. Final Report of the Constitutional Commission, Volume 2, AGPS, Canberra, 1988, para.10.242, p.689.
5. *Family Law Act* — Directions for Amendment — Government Response to the Report by Joint Select Committee into Certain Aspects of the Operation and Interpretation of the Family Law Act, December 1993.
6. Family Law Council, Letter of Advice to the Attorney-General on the Operation of the (UK) *Children Act 1989*, 10 March 1994.
7. Section 19C (Admissions made to mediators) and s.19M (Protection of Mediators) of the *Family Law Act 1975*.
8. Family Law Council, Letter of Advice to the Attorney-General on the Operation of the (UK) *Children Act 1989*, 10 March 1994. See also the comments by Nicholson CJ in 'In the Marriage of Forck and Thomas' (1993) 16 *Fam LR* 516 at 522.