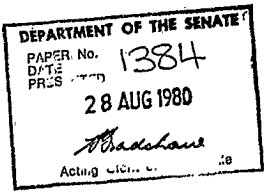

THE PARLIAMENT OF THE COMMONWEALTH OF AUSTRALIA

FAMILY LAW IN AUSTRALIA

REPORT OF THE JOINT SELECT COMMITTEE ON THE FAMILY LAW ACT

JULY 1980

Volume One

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TERMS OF REFERENCE

The Committee has been appointed to inquire into and report upon—

(a) the provisions, and the operation, of the *Family Law Act* 1975, with particular regard to:
  (i) the ground of divorce and whether there should be other grounds;
  (ii) its effect on the institution of marriage and the family;
  (iii) maintenance, property and custody proceedings including:
    (a) the bases on which orders may be made in such proceedings; and
    (b) the enforcement of orders in such proceedings;
  (iv) the organisation of the Family Court of Australia and its conduct of proceedings;
  (v) the conduct of proceedings by State and Territory courts exercising jurisdiction under the Act;
  (vi) whether the Family Court should be more open to the public when hearing proceedings, and whether publication of the details of proceedings under the Act should be permitted;
  (vii) the services provided by:
    (a) the counsellors attached to the Family Courts; and
    (b) approved voluntary marriage counselling organisations;
  (viii) the cost of proceedings under the Act; and

(b) any other matters under the Act referred by the Attorney-General.

Membership of the Committee in the 31st Parliament

Chairman	Mr P. M. Ruddock, M.P.
Deputy Chairman	Senator J. I. Melzer†
Members	Senator R. N. Coleman† Dr N. Blewett* The Hon. L. F. Bowen, M.P. Mr J. J. Brown, M. P. The Hon. K. M. Cairns, M.P. Senator G. S. Davidson Mr P. D. Falconer, M.P. Mr A. C. Holding, M.P. The Hon. R. C. Katter, M.P. Mr S. A. Lusher, M.P. Mr J. R. Martyr, M.P. Senator A. J. Missen Senator M. S. Walters The Hon. F. E. Stewart, M.P.*
Clerk to the Committee	Mr D. W. Nairn
Specialist Adviser	Mr R. W. Gee, LA(Syd), LLB(Syd). Barrister-at-Law

† Senator Coleman resigned as Deputy Chairman of the Committee. Senator Melzer was elected Deputy Chairman on 7 May, 1980.

* Dr Blewett was elected to the Committee on 10 May, 1979 to replace The Hon. F. E. Stewart, M.P. deceased.

CONTENTS

RECOMMENDATIONS

The Committee Recommends that:

On the Constitutional Limitations of the Jurisdiction of the Family Law Act.

1. the proposed reference of powers from the States to the Commonwealth in the outstanding areas of children and property be proceeded with as a matter of urgency. The Commonwealth should proceed to enact legislation in this regard on the recommendation of a majority of States if agreement of all States proves impossible to procure (para 2.69)

2. independent of any reference of powers by the States, the Commonwealth move to amend the Family Law Act to exploit to the fullest extent its legislative powers with respect to children; the rights of third parties and re-introduction of the original definition of 'child of the marriage'. (para 2.70)

3. the Commonwealth move to amend the Family Law Act by relating the jurisdiction in respect of matrimonial property disputes to the marriage power. It is proposed that the property jurisdiction be limited to require:
   (i) the proceedings to be between the parties to the marriage;
   (ii) that the dispute relates to the property or proprietary claims of either party;
   (iii) that the claim arises out of the marital relationship, or arises by reason of the fact that the parties are married;
   The Committee believes such legislation would survive testing of its validity in the High Court (para 2.71)

4. the Government of the States and the Commonwealth examine the possibility of issuing State Commissions to federal Family Court judges and Federal Commissions to selected State judges to enable the exercise of a unified jurisdiction in family law matters throughout Australia (para 2.73)

On Dissolution and Nullity of Marriage

5. those considering matrimony should be appraised of the responsibility involved in that state and the consequences that will result from marriage breakdown. As a means of highlighting this approach the Committee recommends that the Marriage Act and the present Family Law Act be consolidated (para 3.24)

6. there should be no change to the provisions of the Act relating to grounds for divorce (para 3.52)

On Children: Custody and Welfare

7. the Institute of Family Studies should undertake research with a view both to assess the value of the procedures under s.63(1) of the Family Law Act, relating to the approval by the court of arrangements reached by the parties to a marriage regarding the welfare of children of the marriage and to examine alternative methods of supervising placement arrangements by couples upon separation. The study should make recommendations as to the extent of involvement of Commonwealth and State welfare departments, voluntary agencies and the court counselling services (para 4.12)

8. the Family Law Act and other legislation of the Commonwealth and the States should be examined by the appropriate authorities to ensure a consistent use of terms such as guardianship, care and control and custody. Where necessary, terms

should be defined so that the nature of the relationship between a child and the person standing in a relationship towards the child are precisely expressed. The *Commonwealth Attorney-General and the Minister for Social Security should take* this matter up with their State counterparts with a view to achieving a uniform approach to the use of these terms. This Committee is of the view that the terms 'guardianship' and 'custody' and 'care and control' should be defined with some care in the Family Law Act itself and, more particularly, that the terms 'guardianship' and 'care and control' should be carried through into other provisions and Part VII of the Act which are relevant e.g. s.61(4), s.64 sub-sections (2), (3), (4), (9), s.67(1), s.68, s.69, s.70. (para 4.17)

9. the Family Law Act be amended to insert into section 61 of the Act, a provision that would empower the Family Court to exercise the prerogative of declaring children within its jurisdiction to be wards of court (para 4.19)

10. the Family Law Act be amended to provide that the court may request a designated official (i.e. an officer responsible for administering child welfare laws in the State or Territory) to intervene in proceedings before the court where the court considers it appropriate so to request in relation to a child of a marriage whose welfare is under consideration in proceedings before the court (para 4.21)

11. in relation to the extent that the wishes of a child should be taken into account in custody proceedings that the specific reference to the age of 14 should be removed from the legislation and not replaced by any reference to a specific age (para 4.34)

12. in order to reduce as far as possible unnecessary bitter and prolonged custody and access proceedings, a new s.70A should be inserted in the Act providing that in proceedings with respect to the custody and guardianship of a child of a marriage, the court shall, as far as practicable make such orders as will avoid further proceedings. (para 4.48)

13. *In order to facilitate the more immediate settlement of disputes over custody* s.64(1) should be drafted to state criteria that the court must consider. It should be provided that—
    (a) The court shall regard the welfare of the child as the paramount consideration;
    (b) The court shall take the following matters into account:
        (i) the relevant conduct, as parents, of the parents of the child;
        (ii) the relevant conduct of any step-parents or persons sharing the care, control and guardianship of the child with the custodian;
        (iii) the wishes of the child's parent or parents as to his custody;
        (iv) the wishes of the child;
        (v) the desirability of, and the effect of, any change in the present care and control of the child;
        (vi) if there is more than one child under consideration the effect of the separation on the children;
        (vii) the education and up-bringing of the child;
        (viii) any other fact or circumstance which, in the opinion of the court, the justice of the case requires to be taken into account.
    (c) Subject to paragraphs (a) and (b), the court may make such order in respect of *those matters as it thinks proper, including an order until further order* (para 4.49)

14. except in cases of urgent necessity no custody case should be listed for

determination by a judge until the parties have attempted to resolve the dispute in pre-trial conferences with court counsellors and registrars (para 4.50)

15. except in cases of urgent necessity no court should entertain an application for interim custody before pre-trial conferences have been conducted. The application for such an interim order should not be made in the absence of a report from a registrar on the outcome of the pre-trial conference (para 4.51)

16. except in cases of urgent necessity (i) no interim custody order should be granted unless the other spouse has been served with notice of the proceedings, (ii) no court should grant such an order in the absence of a report from a court officer who has interviewed the respondent and advised that person of the implications of the order (para. 4.52)

17. Section 64(4) of the Family Law Act be amended to provide that upon the death of a person awarded sole custody of a child, the child should become a ward of court pending the further order of the court. It is further recommended that the Act 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 (para. 4.57)

18. some means be employed to formalise the use of State police forces to assist in the enforcement of custody and access orders. The Committee therefore considers that steps should be taken for the necessary arrangements to be made with State police forces as envisaged by s.112 of the Family Law Act. (para 4.59)

19. a marshall of the court as provided for in s.37(4) should be appointed to the Family Court in each State to liaise with State and Commonwealth police. Deputy marshalls should be appointed to registries in the States. Further, the Commonwealth should fund the States in respect of the cost of their police. (para 4.61)

20. it should be clearly provided in legislation that in circumstances where a custody order cannot be enforced because a child's whereabouts are not known it shall be incumbent on Commonwealth Departments of State having information concerning the whereabouts of the child to provide an authorised officer of the court with such information as he may require to enforce the orders and processes of the court. (para 4.64)

21. a party absconding with a child should be required to reimburse the Government for any costs associated with the recovery of such a child. Therefore s.117 of the Family Law Act should be amended to put beyond doubt that the court has power to make an order directing the reimbursement of the Government for its expenses *in assisting a party to regain custody to a child taken interstate or out of Australia* (para 4.71)

On the Financial Consequences to the Parties of Divorce

22. section 72 concerning the right of a spouse to maintenance be amended to read:
    (i) A party to a marriage is liable to maintain the other party to the extent that the first party is reasonably able to do so, if, and only if, that other party is unable to support herself or himself adequately whether:
        (a) by reason of having the care and control of a child of the marriage who has not attained the age of 18 years, or
        (b) by reason of age or physical or mental incapacity for appropriate gainful employment, or

(c) for any other adequate reason.

(ii) In considering whether a party to a marriage is unable to support himself or herself adquately by reason of the matters contained in paras (a), (b) and (c) of subsection (1) the court shall have regard to any relevant matter referred to in s.75(2). (Para 5.9)

23. the *Social Services Act 1947* be amended to delete provisions requiring Social Security applicants to take maintenance proceedings (ss. 62(3) and 83AAD) with a new provision to be inserted that would have the effect that:
    (1) the Department of Social Security will assess the means of the liable relative and determine what it is proper for him to pay to the Department in or towards satisfaction of the money it has paid out;
    (2) the Department will be entitled to order the liable relative to pay the Department the amount so assessed. For the purposes of exposition we shall call such an order by the Department an 'administrative order';
    (3) subject to rights of review and appeal, the administrative order will be legally binding on the liable relative and enforceable against him;
    (4) the amount of the administrative order will in no case exceed the amount of the applicant's entitlement to social service benefits. Within this limit the amount will be within the Department's discretion. In exercising this discretion the Department will act in accordance with published criteria for assessment, framed so as to produce a fair result in the normal run of cases; but the discretion will always be available to allow for individual circumstances;
    (5) the Department will never be in a position of having to pass judgment on matrimonial conduct. (para 5.30)

24. the *Social Services Act 1947* be amended to extend eligibility for Class A and Class B widows pensions to all separated wives rather than just to 'deserted wives' as at present. For statistical purposes the Committee believes it is desirable that a record be maintained of payments to separated wives and supporting parents as distinct from widows. (para 5.33)

25. section 75(2)(f) be amended to read: The eligibility of either party for a pension, allowance or benefit under any superannuation fund or scheme, or the rate of any such pension, allowance or benefit being paid to either party. (para 5.36)

26. section 75(2)(l) be amended to read: The need to protect the position and reasonable expectations of a party to a marriage who had contributed to the welfare of the family during the marriage and that, but for the dissolution of the marriage, such party would have continued so to contribute (para 5.39)

27. section 75(2)(o) be repealed and the following provision inserted: Any fact or circumstance including any conduct of the applicant for maintenance towards the respondent and relevant to the matrimonial relationship, which, in the opinion of the court, the justice of the case requires to be taken into account (para. 5.39)

28. the Regulations prescribe the various amounts payable in respect of children's maintenance using criteria supplied by the Commonwealth Statistician. Furthermore, the Committee recommends that the amount payable to children should be subject to automatic adjustment. Accordingly, it is recommended that the Commonwealth Statistician regularly determine variations in the amount based on the relative cost of bringing up children (para 5.52)

29. the Treasurer refer the matter of the tax deductibility of maintenance for consideration by an inter-departmental committee after canvassing the views of organisations interested in the matter and to have regard to the effect of such a proposal on the ability to pay maintenance. (para 5.59)

30. the Government review the arrangements for the collection and enforcement of maintenance with a view to establishing a consistent administrative approach. An agency should be created, modelled on the systems developed by the Department of Community Services in South Australia and the Collector of Maintenance in Western Australia. In view of the withdrawal of some States and the prospective withdrawal of other States from the responsibility of providing grants under the States Grants (Deserted Wives) Act, it is considered that this agency should be established in and administered by the Department of Social Security in close liaison with the Family Court and courts of summary jurisdiction under the Family Law Act (para. 5.72)

31. procedures for enforcement of Maintenance should be improved and in particular it is recommended that:
    (a) maintenance proceedings be undertaken by specialist Family Court magistrates in designated courts specialising in family law work (see further Chapter 8);
    (b) the regulations be amended to ensure the attendance, wherever possible, of both parties when maintenance matters are dealt with in the court;
    (c) the regulations be amended to ensure that upon default by a respondent to a maintenance order the order is reviewed by the court, or the defaulter examined as to his means, to ensure that the order reflects the capacity of the defaulter to pay;
    (d) steps be taken to improve the capacity of courts of summary jurisdiction exercising jurisdiction under the Act to perform these functions adequately. The Committee makes specific recommendations in this regard in chapter 8.
    (e) the agency established in accordance with recommendation 30 be equipped to provide credit counselling facilities and conciliation services to assist parties involved in maintenance proceedings;
    (f) section 40(3) of the Bankruptcy Act be amended by the addition of a further sub-paragraph to deem a maintenance order to be a final order for the purpose of founding procedures in Bankruptcy;
    (g) the Family Law Act should be amended to place beyond doubt the court's power to imprison for contempt in the face of the court in proceedings relating to maintenance;
    (h) amendment to the Family Law Act to effect that those amendments to the Act and Regulations proposed by the Family Law Council in its Working Paper (no. 4) on the Enforcement of Maintenance be made, namely: Amendment of regulations 136, 139(4), 144 and 145 to enable the Collector, Deputy Collector or Assistant Collector of Maintenance in South Australia and Western Australia to apply for sequestration (Reg. 136) and to transfer an order interstate;
    (i) a provision be included in the Regulations to issue a warrant in the first instance where an application is lodged under Regulation 133(2) but the whereabouts of the payer is unknown;
    (j) amendments to Regulation 133 be made to authorise withdrawal of a warrant;
    (k) amendment of the Regulations relating to sequestration be made to include the power to sell specific real estate; alternatively that the enforcement regulations be amended to empower the court to make an order for the sale of a particular item of the respondent's real property in satisfaction of an unsatisfied order;

(l) the Family Law Act be amended to permit the registration of lump sum maintenance orders in State courts and to permit the enforcement of such orders in the State courts (c.f. s.104(1) of *Matrimonial Causes Act* 1959). (para 5.83)

32. section 79A of the Family Law Act dealing with the setting aside of orders altering property interests be repealed and that a new section be inserted in its stead to provide that:
    (a) on the application of a person affected by an order made under s.79 of the Family Law Act or s.86 of the Matrimonial Causes Act, the court may if it is satisfied that there is just cause for so doing, set aside that order, and if it thinks fit, make another order under and subject to the terms of s.79 of the Act in substitution for the order so set aside;
    (b) in the exercise of this power to set aside an order made under s.79 of the Family Law Act or s.86 of the Matrimonial Causes Act the court shall have regard to the interests of, and shall make any order propert for the protection of, a *bona fide* purchaser or other persons interested;
    (c) proceedings for the setting aside of an order made under s.79 of the Family Law Act or s.86 of the Matrimonial Causes Act shall not be instituted until leave has been obtained from the court in which the proceedings are to be instituted;
    (d) the court shall not grant such leave unless it is satisfied that hardship would be caused to a party to a marriage or to a child of the marriage if leave were not granted (para 5.98)

33. the Family Law Act be amended to give a discretionary power to the court to defer the making of a final order in property proceedings until superannuation benefits have been received, and where necessary to make an interim order (para 5.109)

34. the Family Law Act be amended to prevent the abatement of a maintenance or property application on the death of the respondent (para 5.110)

35. to ensure that the contribution of a spouse to be considered is his or her contribution to the welfare of the family there be an amendment to s.79(4) relation to alterations of property interests to remove any possibility of an interpretation requiring a nexus between a spouse's contributions to and a specific item of property (para 5.136)

36. arrangements for the introduction of a full Matrimonial Property Regime should be preceded by:
    (a) a survey to establish community attitudes to the proposal;
    (b) a full study carried out by the Law Reform Commission (Cwlth) of the legal implications of the introduction of such a scheme;
    (c) the assessment of the experience of the New Zealand and various Canadian schemes (para 5.155)

37. the Family Law Act be amended to provide that during the subsistence of a marriage and on the breakup of a marriage, the parties to the marriage will be presumed to own the matrimonial home in equal shares (para 5.158)

On Injunctions

38. while there is no immediate need for an amendment of the Act to clarify the power of the court to grant an injunction to preserve a prospective right to a property under s.78 or 79 where no application for dissolution or nullity has been filed, such an amendment to ensure that this power is available would be necessary, should doubt be cast on the principle that once a marriage has broken down the court's power to grant an injunction under s.114(1) can be used to protect the incipient or inchoate right to seek a property order under s.79 (para 6.17)

39. section 114 of the Family Law Act be amended to give a judge a discretion to attach a power of arrest to an order or injunction where the judge:
    (i) makes an order or grants an injunction containing a provision relating to the personal protection of the applicant or a child of the marriage, or makes an exclusion order;
    (ii) is satisfied that the other party to the marriage has caused actual bodily harm to the applicant or the child; and
    (iii) considers that the other party is likely to do so again.

    Both the Federal and State police should have the powers of arrest in cases where there is reasonable cause for suspecting a breach of the order or injunction by reason of violence or entry into the excluded premises or area. They should be required to bring the person so arrested before any judge or magistrate exercising jurisdiction under the Act within 24 hours and to seek the directions of the court as to the time and place at which the arrested person is to be brought before the court (para 6.22)

On the Organisation of the Family Court and its Conduct of Proceedings

40. there be a pool of 10 judges from which judges are drawn to constitute Full Court Benches. Six of these judges would be permanent members. The remaining 4 positions would rotate being filled by other judges on the basis of seniority from time to time. (para 7.34)

41. the Attorney-General pursuant to s.22(2A) of the Family Law Act grant federal commissions to the judges of the Family Court of Western Australia (para 7.36)

42. interpreter services be made available to parties who so require it. Any such interpreter should have full accreditation. (para 7.40)

43. the Family Court recruit people with a sensitivity and experience in working with ethnic communities residing in the area where the court is located. (para 7.44)

44. a wider range of explanatory documents in the major language groupings be prepared in all areas of the courts' operations, particularly on counselling and specific areas of the Act such as custody, maintenance and property. It is further recommended that wider publicity is given in the major languages, to the services provided by voluntary marriage guidance organisations. (para 7.47)

45. (i) pre-trial proceedings should be mandatory in all disputed cases involving child custody or access or financial relationships other than those of urgent necessity and (ii) that the Department of the Attorney-General in association with the Principal Court Registrar undertake immediate studies to determine the number of deputy registrars that would be required to ensure that pre-trial proceedings are available in respect of every disputed matter involving either child custody or financial relationships and that the Public Service Board facilitate these appointments as a matter of urgency (para 7.56)

46. studies be undertaken with a view to establishing branch registries consisting of deputy registrars and court counsellors in rural areas and areas of large population not adequately served by the existing registries of the court and that the Government make the necessary resources available as a matter of urgency. These studies should also investigate the extent to which a re-allocation of resources within or between existing registries may alleviate some of the present staffing shortages (para 7.62)

47 branch registries be permanently located in centres visited by the Family Court on circuit so that the work of the court can continue in a regular way, pending the periodic visits of the judges. (para 7.65)

48. the necessary amendments to procedures be made to enable parties who wish to do so to file joint applications for dissolution (para 7.70)

49. the government should take steps to foster organisations like citizens' advice bureaux in Australia (para 7.81)

50. simplified procedures in the cases of undefended dissolution be introduced in Australia to provide for affidavit evidence without the necessity for parties to appear unless the court otherwise decrees (para. 7.83)

51. the Committee supports the recommendations of the Family Law Council in relation to the body charged with the making of rules and regulations and accordingly recommends that:
    (a) the rule making power under the Family Law Act should reside in a body of judges of the Family Court of Australia and the Family Court of Western Australia with provision for the rules to apply to other courts exercising jurisdiction under the Act;
    (b) matters such as costs and fees be excluded from the rule-making power;
    (c) a committee responsible to the body of judges should continue to have the responsibility for receiving and considering proposals for the amendment of the regulations, for consulting with the legal profession and other interested groups and for making recommendations to the judges;
    (d) the committee should have representation from the legal profession, the registrars of the court, the Attorney-General's Department and courts of summary jurisdiction and should consult widely before reaching its conclusion (para 7.91)

52. the Regulations be amended to empower the Principal Registrar at the direction of the Chief Judge to issue directions binding on all registries and staff of the Family Court (para 7.98)

53. the membership of the Family Law Council be extended to include representation of federal parliament. This representation should be drawn from the Senate and the House of Representatives. There should also be representation of magistrates on the Council (para 7.102)

On the Conduct of Proceedings by State and Territory Courts

54. the Family Court of the A.C.T. should be invested with as broad a jurisdiction in family law matters under s.31(1)(c) of the Family Law Act as is possible (para 8.5)

55. branch registries comprising a deputy registrar and court counsellor be established

in Darwin and Alice Springs to provide services to the Courts in the Territory exercising jurisdiction under the Family Law Act (para 8.8)

56. steps be taken to obtain better statistical information concerning the work of the courts of summary jurisdiction under the Family Law Act (para 8.14)

57. every effort should be made to ensure that all courts of summary jurisdiction exercising jurisdiction under the Family Law Act or likely to exercise such jurisdiction, should be supported by the provision of services to enable them to provide the legal services under the Act that they are expected to provide. Conciliation services such as counselling and pre-trial procedures should be available from these courts. In this connection our recommendation 46 in chapter 7 that branch registries staffed by counsellors and deputy registrars of the Family Court in remote regions should be noted. The services of these officers should be available to local courts of summary jurisdiction as well as to the Family Court on circuit (para 8.34)

58. the Family Law Act be amended to provide that the federal jurisdiction of courts of summary jurisdiction be exercised in each State by magistrates (specifically named) specially authorised by the Governor-General to exercise such jurisdiction. It is envisaged that the Governor-General would only authorise the exercise of jurisdiction by magistrates considered by his advisers to be appropriately qualified to exercise the jurisdiction. The Act should be amended to empower the Governor-General by Proclamation to confer jurisdiction on identified State courts and in respect of identified elements of the jurisdiction in family law matters (para 8.39)

Open and Closed Courts

59. the Family Court be open to the public provided that the judge retains a discretion to exclude persons from the court of its own motion or on the application of a party. In the case of closed proceedings, the court should have a discretion to permit persons to enter (para 9.8)

60. the publication of the details of proceedings under the Act should be permitted and that steps be taken to relax the restrictions on publication contained in s.121 of the Family Law Act, provided that the names of the parties and any other identifying information is prohibited from disclosure. Severe penalties should be provided for infringement. (para 9.18)

Family Court Counselling and Voluntary Marriage Guidance Organisations

61. Marriage Counselling be defined under the Family Law Act to encompass pre-marital counselling, marital counselling, pre-divorce supportive counselling during divorce and post-divorce counselling. The Committee further recommends that education for marriage and family life be further supported either by incorporating provisions in the Family Law Act or by reinforcing those in the Marriage Act (para 10.16)

62. steps be taken to amend the Family Law Act to discourage the practice of ordering reportable conferences under s.62 and to preserve the original intention that where a counselling conference is ordered under s.62(1) it should be confidential (para 10.61)

63. section 16(2) of the Family Law Act which states: 'A party to a marriage may seek the assistance of the counselling facilities of the Family Court or of a Family

Court of a State, and the Principal Director of Court Counselling of the Family Court or an appropriate officer of the Family Court of that State as the case may be, shall, as far as practicable make those facilities available' be amended by adding after the words 'A party to', the words 'or a child of'. This would allow a child to seek the intervention of a counsellor where necessary and gives recognition to the right of a child to initiate proceedings. (para 10.87)

On the Cost of Proceedings under the Act

64. the settlement of ancillary matters, that is custody, access, injunctions and property settlement matters, should be encouraged as far as possible. (para 11.34)

65. the Family Court of Australia be allowed a wider discretion to order costs in proceedings under the Family Law Act (para 11.39)

66. all factors listed in the amendment to s.117(1) and (2) of the Family Law Act, as proposed by the Law Council of Australia to the Williams Inquiry, should be included in the Act as factors to be taken into account when an order for costs is being considered by the court. (para 11.48)

67. the Act and Regulations be amended to provide specifically for the concept of a proposal for settlement and that where such an offer to settle has been made it should be a factor to be taken into account in the exercise of the discretion to order costs (para 11.52)

68. the fee for filing an application for a decree of dissolution or nullity should not be abolished but should be reduced and that steps should be taken to amend the Regulations to broaden the circumstances in which the exemption can be claimed (para 11.56)

69. the Regulations be amended to provide for the refunding of the filing fee to a party making such a request in circumstances where that party has filed a dissolution application without being aware that the other party to the marriage has already filed an application at an earlier date (para 11.58)

70. action be taken to establish an appeal cost fund in the federal area as such, including the Family Court of Australia (para 11.61)

71. the court's conciliation service be developed where necessary to encourage parties to bargain and negotiate and settle out of court, (para 11.66)

72. the right to taxation of solicitors costs be more widely drawn to the public's attention and be included in material published by the court for the information of the public (para 11.68)

Chapter 1

HISTORICAL DEVELOPMENT OF FAMILY LAW IN AUSTRALIA

1.0 Throughout the period 1858-1873 divorce became available progressively in the Australian colonies.[1] The early Australian legislation was modelled on the UK *Matrimonial Causes Act* 1857 which for the first time in English Law permitted divorce by judicial decree. As the Act was originally passed, adultery was the one matrimonial offence which could justify dissolution of marriage, although in order for a wife to rely on her husband's adultery she had to prove either adultery coupled with incest, bigamy, cruelty or two years desertion or, alternatively, rape or an unnatural offence. The principle that divorce was a remedy for a matrimonial wrong was re-inforced by provisions in the legislation precluding the court from granting a decree if the petitioner had been guilty of connivance or condonation or if the parties had entered into a collusive agreement concerning the prosecution of a suit. As well as the absolute bars of condonation, connivance and collusion, the legislation provided that where the petitioner was also guilty of a matrimonial offence such as adultery, the court had discretion to refuse a decree. The principles embodied in the *Matrimonial Causes Act* 1857 formed the foundation of the law of divorce in both England and Australia until recent time. But in both countries the grounds on which a decree of divorce could be pronounced were extended with the passage of time.

The Matrimonial Causes Act 1959

1.1 Apart from intermittent interventions by the Commonwealth to meet specific situations,[2] family law remained until 1959 squarely under the jurisdiction of the laws of the several States.

1.2 In 1957 Mr P. E. Joske, Q.C., the Federal Member for *Balaclava,* author of a leading text book on domestic relations and a campaigner for a uniform law of marriage, introduced a Private Member's Bill into the House of Representatives. His Bill proceeded to a second reading but no further as at that stage the Government of the day undertook to sponsor the measure and it was withdrawn to be redrafted.

1.3 When the Government introduced its own legislation in the form of the Matrimonial Causes Bill 1959, it created an Australian—as distinct from various States—domicile, for the purpose of proceedings under the Act. It consolidated the laws of the several States into a code of general application throughout Australia. Section 28 of the Act provided for 14 grounds for divorce referred to in the Act as principal relief. Maintenance, custody and property matters, characterised as ancillary matters, were to be within the jurisdiction of the court if dependent on the prior or concurrent existence of proceedings for principal relief. In the absence of proceedings for principal relief these matters remained to be dealt with by the courts under State laws. The *Matrimonial Causes Bill* followed the practice developed in Australia since federation whereby federal jurisdiction was conferred on State Courts for the purpose of administration of the federal law.

1.4 The Commonwealth moved, by the Matrimonial Causes Act to cover the field with regard to dissolution of marriage and, with the *Marriage Act* 1961, to deal with

the formalities of the creation of valid marriage. Its move into this latter area resulted in protests from State governments culminating in a challenge to the Marriage Act before the High Court in the case of *A.G. for the State of Victoria v. Commonwealth*.[3] The provisions of the legislation concerning legitimation of ex-nuptial children by the subsequent marriage of their parents, and the legitimacy of certain children of a marriage, later declared void by the court, were challenged by the States on the ground that they were not laws concerning marriage but laws concerning legitimation, and therefore concerned succession which was a State rather than a Commonwealth area of responsibility. The High Court by a majority upheld the power of the Commonwealth to make laws on these matters under its constitutional power with respect to marriage.

The Family Law Act 1975

1.5 The Commonwealth did not attempt more in its 1959–61 legislation than to codify the existing State laws of marriage and divorce. Fundamental changes were proposed in a series of Bills introduced into the Senate by the Attorney-General, Senator Murphy, in 1973 and 1974.

1.6 Opinion in Australia had been affected by reports of the debate which had taken place in the United Kingdom on the question of divorce law reform which had resulted in the *Divorce Reform Act* 1969. This legislation effected fundamental changes to the law in that it abolished the bars to divorce and replaced the several grounds for divorce with a single ground of irretrievable breakdown. This provision was, however, somewhat of a compromise. Elements of fault were retained as part of the objective tests by means of which irretrievable breakdown was to be established. In the United States of America a number of States had introduced consensual grounds for divorce and in one State, California, breakdown of the marriage and insanity had become the sole grounds. From U.S.A. also came the concept of the specialised Conciliation Court which was ultimately adopted in Australia with the founding of the Family Court: an approach which recognised the relevance of other expertise besides legal expertise in the resolution of matrimonial disputes.

1.7 In 1972 an Inquiry was commenced by the Senate Standing Committee on Constitutional and Legal Affairs into the *The Law and Administration of Divorce, Custody and Family Matters with Particular Regard to Oppressive Costs, Delays, Indignities and Other Injustices*. This Inquiry was interrupted by the election of that year and resumed in 1973 in the 28th Parliament. In the meantime action had been taken by the Government intended to affect the operation of the law. The Attorney-General, Senator Murphy, Q.C., attempted by means of amendments to regulations to make changes in the administration of the law. Objection was taken to this method of bringing about changes to the substantive law and the regulations were disallowed by the Senate in 1979.[4]

1.8 Just before the Senate disallowed the Rules, Senator Murphy invited the Law Council of Australia to make recommendations to him for reform of the *Matrimonial Causes Act* 1959. An *ad hoc* Committee was set up by the Law Council which, shortly afterwards, made a series of recommendations that formed the basis for the first draft of what has become the Family Law Act. On 1 April 1973, Senator Murphy announced he would seek Cabinet approval for a Bill to replace the existing grounds of divorce with one no-fault ground, irretrievable breakdown of marriage. The ground would be established by twelve months separation of the parties.

1.9 Senator Murphy introduced the Family Law Bill for the first time in the Senate on 13 December 1973. Immediately afterwards, copies of the Bill and explanatory documents were widely circulated amongst persons and organisations interested in divorce law reform. The Bill lapsed, along with other business before Parliament, when Parliament was prorogued on 14 February 1974. A further Bill was subsequently reintroduced into the Senate on 3 April, 1974. It lapsed again as a result of the double dissolution of Parliament preceding the Federal election in May of that year, and was again reintroduced in the Senate on 1 August 1974. On both occasions when the Bill had to be reintroduced, the opportunity was taken to make some amendments in response to comments and suggestions received. The principles of the Bill, however, remained unchanged.

1.10 After the first introduction of the Bill into Parliament, Senator Murphy had successfully moved in the Senate, on 8 April, 1974, that the Senate Standing Committee on Constitutional and Legal Affairs consider the clauses of the Bill during its consideration of the general reference to it on the question of divorce law reform. After the second reintroduction of the Bill into Parliament on 1 August 1974, and the re-establishment of the Committee on 16 August, the Senate again approved a motion by Senator Murphy that the Committee consider the clauses of the Bill as last reintroduced.

1.11 On 24 September 1974 the Senate Committee tabled an interim report[5] expressing general agreement with the purposes and content of the Bill. The Committee presented its final report [6] on the law and administration of divorce and related matters and the Family Law Bill on 15 October. The report supported all the main principles embodied in the Bill but did, however, recommend a substantial number of modifications and additions to the provisions. Amendments were moved in the Senate to give effect to nearly all of those recommendations, the most notable of which was the proposal for the Family Court of Australia.

1.12 The Bill incorporating these amendments was passed by the Senate after a lengthy debate on 27 November 1974. The following day it was introduced into the House of Representatives where it was also extensively debated before finally being passed with a small number of minor amendments on 21 May 1975. The Bill was returned to the Senate, which agreed to the House's amendments on 29 May, 1975 and the Bill received Royal Assent on 12 June 1975.

1.13 The Bill introduced by the Government in 1973 was based on the following stated principles:[7]

- a good family law should buttress, rather than undermine, the stability of marriage;
- where a marriage has irretrievably broken down the legal shell should be destroyed with the maximum fairness and the minimum bitterness, distress and humiliation;
- the future of the children of a broken marriage needs to be considered by the best possible tribunal assisted by the skills of Welfare Officers and other counselling staff where needed;
- the financial dispute between the spouses should be resolved as quickly and as finally as possible;
- the whole process should be performed with dignity, relative privacy and as little expense as possible.

1.14 The Family Law Act changed the existing law in that:

- it abolished most of the matrimonial remedies inherited from the old ecclesiastical courts. There are now two principal remedies: the dissolution of a valid marriage and the annulment of a marriage which is totally void. The remedy known as the annulment of a voidable marriage is abolished;
- it abolished the various matrimonial offences as grounds for divorce and it decreed that a marriage can only be dissolved on the single ground of irretrievable breakdown of the marriage evidenced by 12 months separation. The no fault approach is carried through into other areas of the legislation. For example, in relation to maintenance the primary test of entitlement of a spouse under section 72 is need and not conduct;
- it proposed to bring about the unification within Australia of the law relating to maintenance, custody and matrimonial property, so far as they relate to the marriage relationship. Under the previous Federal Act such proceedings could only be entertained if they were incidental to proceedings for principal relief;
- it abolished the dependent domicile of the wife, the right of a husband to sue the wife's lover for damages for adultery and enticement and imprisonment for maintenance default;
- it attempted to deal with the high cost of divorce proceedings by eliminating the need to investigate the question of fault and by reducing legal formalities to a minimum; under section 117 each party to the proceedings except in special circumstances, shall bear the costs of his/her own proceedings;
- it made provision for a Family Law Council consisting of judges, public servants, representatives of marriage counselling organisations and other persons concerned with family matters whose function is to advise the Attorney-General on the working of the Act and of family law matters, generally. Provision was also made for the establishment of an Institute of Family Studies conceived as a research body to provide objective information to assist in the formulation of Government policies with regard to the family;
- it created the Family Court of Australia which is a federal tribunal staffed by persons with particular aptitude and training with regard to family law. It has taken over the matrimonial jurisdiction of the State Supreme Courts. The Family Court operates throughout Australia, except in Western Australia which has established a State Family Court under section 41 of the Act. Appeals from the Family Court and appeals under the Act from the Family Court of Western Australia go to the Full Court of the Family Court;
- it provided that proceedings in the Family Court are closed and publication of evidence in such proceedings except where specifically authorised by section 121, is prohibited;
- it abolished the prohibited degrees of affinity and reduced prohibited degrees of consanguinity to brother-sister and descendant-ancestor relationships for purposes of a valid marriage (these provisions were later transferred to the Marriage Act).

Amendments to the Family Law Act

1.15 Major provisions of the Family Law Act were challenged in the High Court in early 1976 in the case of *Russell* v. *Russell* and *Farrelly* v. *Farrelly*.[8] Although the High Court substantially affirmed the Act, it did hold that certain provisions were beyond the Constitutional power of the Commonwealth. Accordingly, on 20 May 1976, the Attorney-General, the Hon. R. J. Ellicott Q.C. introduced legislation to

amend the Act,[9] so as to bring it into line with the decision of the High Court. The High Court's decision in the *Russell* case and the consequent amending legislation will be discussed in some detail in chapter 2 of this Report.

1.16 Further amendments to the Family Law Act were made in the same year by the *Family Law Amendment Act (No. 2)* 1976.[10] The purpose of this amendment was to enable regulations to be made imposing court fees.

1.17 Following the referendum in May 1977 relating to the retiring ages of Federal Judges amendments were made to the Family Law Act in August 1977.[11] The referendum empowered the Commonwealth to fix a retiring age for Judges. Accordingly, the amending Act fixed a retiring age of 65 years for judges of the Family Court.

1.18 Since the appointment of this Committee, Parliament has considered and passed a further Amending Bill making a number of further changes to the Family Law Act. These were contained in the *Family Law Amendment Act* 1979.[12] The most important amendments related to the provisions of the Act concerning the Institute of Family Studies.

Joint Select Committee on the Family Law Act

1.19 The interest which the Family Law Act has engendered in the community and thereby in Parliament, led to the appointment of this Committee.

1.20 On 17 August 1978 the Attorney-General moved in the Senate for the appointment of a Joint Select Committee to inquire into and report upon the provisions and operation of the Family Law Act. When the House of Representatives was considering the message of the Senate concerning the appointment of the Committee, amendments to the resolution of appointment were proposed. Amendments to add paragraph (a) (ii) to the terms of reference for the Inquiry and to increase proportionally the representation of members of the House of Representatives on the Committee were endorsed by the House and later agreed to by the Senate. Parliament agreed to the resolution of appointment on 26 September 1978 and Mr Speaker and Mr President informed the House of Representatives and the Senate of the nomination of members to the Committee between 12 to 17 October. The Committee being duly constituted met for the first time on Wednesday 18 October 1978. At this meeting Mr Ruddock was elected Chairman and Senator Coleman Deputy Chairman of the Committee. Senator Coleman advised the Committee that for reasons of illness she would not be available for some of the deliberative meetings when the Report would be considered and that she proposed to resign as Deputy Chairman. Senator Melzer was elected Deputy Chairman on 7 May 1980. Appendix 1 of the Report comprises extracts from the Votes and Proceedings of the House of Representatives and the Journals of the Senate concerning the Committee. There was only one change made to the membership of the Committee during the Inquiry. This was brought about by the untimely death of our colleague Mr Frank Stewart, Member for *Grayndler*, who died at Easter 1979. Referring to Mr Stewart the Chairman said when opening the public hearing of the Committee on 25 April 1979:

> Our meeting today is the first one since an occurrence which filled Committee members with sadness. Since our last meeting in Perth at which he was present our colleague, the Honourable Frank Stewart, has passed away, and we all feel the loss of his friendship and the loyalty and support he has given us so far in this inquiry. It is not my intention to unduly eulogise Frank Stewart other than to reflect on his wise counsel in our deliberative meetings and his most punctilious attendance and conscientious preparation for all our public

hearings. He will be sadly missed by all members. On 10 May 1979, the Presiding Officers informed the Parliament that Dr Blewett would replace Mr Stewart as a member of the Committee.

Publicity for the Inquiry and Submissions Received

1.21 At its first meeting the Committee authorised the placement of public advertisements in the metropolitan daily press and certain other journals informing the public of the appointment of the Committee, its terms of reference and that the Committee was inviting interested persons and organisations to make written *submissions to the Inquiry by 31 December 1978. The date for receipt of submissions* was later extended to 31 March 1979. The Committee continued to receive correspondence from the public concerning the Inquiry throughout the period it sat. All such items were circulated and considered by the Committee members. In all, some 504 written communications were received and accepted as submissions to the Inquiry. This positive response to our request for submissions indicated to us the extent of the interest and concern throughout the nation in the Family Law Act and its administration. Submissions ranged from letters from individuals relating their own experience to representations by Church groups from all denominations, professional groups interested in the operation of the family law system, as well as other observers of the Family Law Act and administration. Wherever possible these submissions were authorised for publication and made available to the public. The submissions authorised for publication are listed in appendix 2. Submissions received from individuals concerning their personal experiences or which involved observations on proceedings of the Family Court were, deliberately, not authorised for publication. They have remained and will remain confidential and prohibited from publication, pursuant to the Standing Orders of both Houses of Parliament (Standing Order 308, Senate Standing Orders, Standing Order 340, House of Representatives Standing Orders). Many people who made these submissions asked that they be regarded as confidential. This has been respected. It was considered that personal submissions making reference to family court proceedings should be considered by the Committee but not accorded any publicity. It was not considered appropriate for a Committee of the Parliament to become involved in matters which either had or could become the subject of court proceedings. It was necessary to emphasise that what was being undertaken was a review of the provisions of the Family Law Act and its administration not the redress of personal grievances. To the extent that these accounts of personal experiences illustrated the operation of the legislation they were useful and were followed up. But it would have been beyond the resources of the Committee and inappropriate to have investigated individual cases to any great extent as this would have necessitated affording all parties involved a rehearing.

Public Hearings and Inspections

1.22 As soon as submissions were received the Committee arranged a program of interstate visits. In the course of the Inquiry the Committee visited all State capital cities at least once and met frequently in Canberra to hold public hearings and to deliberate on the evidence. The approach adopted with regard to public hearings was explained by the Chairman when opening the Committee's first set of public hearings in Sydney:

> It should be stressed that it will not be possible for this Committee to hear all those who have made submissions. That would be almost an impossible task if we are to complete the Inquiry by the end of this year, as our resolution requires. It is therefore necessary for us to select submissions for presentation so that a representative sample of the various points of view expressed are given at our public hearings. It is our intention to authorise for publication submissions made to the Inquiry other than those which for reasons of confidentiality should be kept private. We resolved some weeks ago, and the list was published and made available, to publish in 'Hansard' form a large number of submissions which we received in the early stages and the Committee has resolved to authorise a further group of 56 submissions for publication. These will eventually appear in a 'Hansard' format and may be obtained from our secretariat. When they are available in the 'Hansard' format they will be publicly available. We intend that they ought to be available for comment. We are authorising their publication early so that we can obtain in relation to those submissions that we do receive, any comments that members of the public wish to make on them.

1.23 This policy was adopted in regard to all our public hearings. Every effort was made to ensure that all viewpoints were presented to and considered by the Committee at public hearings. A Hansard record was made of the proceedings which will be bound and placed in the National Library on completion of the Inquiry. It has been widely available to interested persons during the course of the Inquiry and should be made available for reference purposes from University and State Libraries. Details of the public hearings held and witnesses who appeared are contained in appendix 2.

1.24 The Committee also made several visits to registries of the Family Court of Australia and visited the Family Court of Western Australia, met judges and officers of the courts and was able to observe proceedings in court and speak to judges and court officials about their work and the problems with which they were confronted. We wish to place on our record our appreciation to Justice Elizabeth Evatt, the Chief Judge of the Family Court, Mr Justice Barblett, Chairman of Judges of the Family Court of Western Australia and Judges and officers of those courts for arranging these inspections.

1.25 The Chairman of the Committee also undertook a private visit overseas during July/August 1979 and was able to meet and discuss family law matters with a number of overseas practitioners and experts in family law. He also observed proceedings in Family Courts in the United Kingdom, Canada and the United States of America. Information on these visits is included in appendix 2.

Seminars

1.26 At the completion of its hearings and inspections the Committee decided that there were certain matters that it would need to consider in greater detail before concluding the Inquiry and writing this Report. Accordingly a series of seminars were arranged so that the Committee could discuss and obtain background in some depth on the issues of custody and welfare of children, matrimonial property, the constitutional limitations on the jurisdiction of the Family Court and maintenance. Discussion papers were developed for the Committee as a basis for round table discussions with invited participants. The participants were either academic experts or practitioners in fields relevant to the work of the administration of the Family Law Act. (See appendix 2 for topics and those who participated). The purpose of these seminars was to enable members of the Committee to obtain a background of information regarding issues involved in these areas of policy. The seminars were held to inform the Committee, not to determine policy.

Research and Source Material used in the Inquiry

1.27 The official transcript of evidence containing observations and recommendations concerning the Family Law Act and its administration is the principal source from which the Report has been compiled. The Committee has otherwise relied on source material generally available to those undertaking research in the family law area. These sources, where relied on, are acknowledged in the end notes of each chapter to the Report. The Committee has found the annual reports and special project studies of the Family Law Council an important and valuable source of current information on many aspects of the Family Law Act. It wishes to place on record its appreciation of the co-operation it has received from the Council throughout the Inquiry. Similarly, the Family Court of Australia and the Family Court of Western Australia have assisted the Committee greatly in providing statistics and other information either spontaneously or when it has been requested. The Committee wishes to place on record its appreciation of the co-operation of the courts, their judges and officers in supplying this information so readily.

1.28 The Committee has not had the resources to commission special research in the area of family law and this Report relies heavily on research material submitted or made available to the Committee by individuals working in the field. The Committee has proceeded in the accustomed manner of Parliamentary committees, relying on the energy and public-spiritedness of concerned citizens to provide much of the information and source material it required.

1.29 In one respect, however, it was considered necessary to commission a study for the purposes of the Inquiry. The second term of reference on the impact of the Family Law Act on the institution of marriage and the family involved considerations of demographic and sociological material and a paper was commissioned from Kathleen M. Jupp an experienced demographer, recently retired from the Centre of Population Studies at the United Nations. This study is considered to be of considerable interest and value because it brings together and up-dates much demographic and sociological material that bears on this issue. It is published as appendix 3 of the Report.

Staff

1.30 The Committee has been assisted throughout the Inquiry by a secretariat provided by the House of Representatives. Details of the secretariat are set out in appendix 2. It has had, since November 1979, the services of Mr Richard Gee of the Sydney Bar, who has been available as consultant and technical adviser. The Committee expresses appreciation for the services rendered by these officers during the Inquiry.

The Report

1.31 The Report has been arranged so that it covers the terms of reference for the Inquiry. Chapter two outlines the problems that have arisen in the endeavour to establish uniform legislation on family law administered by a Family Court in the Australian federal system. Chapter three considers the first two terms of reference, chapters four and five contain a detailed discussion of the disposition of custody after divorce and the arrangement of the financial affairs of the parties. The remainder of the Report comprises chapters related specifically to terms of reference.

1.32 It has been necessary for the Committee to obtain two extensions of time to enable it to complete the Inquiry. It was originally asked to report by 31 December 1979. It obtained an extension first to 31 May and then to 31 August 1980. The Committee regrets these delays in completing the Inquiry but is satisfied that without them it would not have given the topic the examination that was required.

Aborigines

1.33 The Committee has attempted to conduct an investigation which is as thorough as was possible given the time limitation on the Inquiry and the resources available. It is aware that it has barely touched on some important matters upon which evidence was received. One such matter was Aboriginal customary marriage. Some Aboriginal people marry according to traditional community customs and laws but do not go through a ceremony prescribed and recognised by the *Marriage Act* 1961 (Cwth). Some traditional Aboriginal marriage laws allow polygamy. These traditional marriages are not recognised by law and parties to them or their children incur certain disabilities as a consequence. The jurisdiction of the Family Law Act does not extend to such marriages which continue to be treated as *de facto* relationships and the parties to these relationships are subject to State Laws. It would be a relatively simple matter to accord recognition to customary marriages by appropriate amendments to Commonwealth legislation. However, the result would be to import into customary law marriages all those values, constraints and responsibilities to which European marriage is subject. The Committee could not be satisfied that such a result was either desired or desirable. Such a change could only be implemented following extensive consultation with the people likely to be affected. Little evidence was presented to us which could be said to be representative of the views of tribal Aborigines in regard to the matter. For those who are interested in the issues raised by this question some notes based on the evidence received by the Committee are inserted as appendix 4. It was noted that the matter is receiving examination by the Law Reform Commission (Cwth). When that Commission's report becomes available it will no doubt be possible for the matter to be considered by the Government.

ENDNOTES

[1] WA *Matrimonial Causes and Divorce Act* 1858 (21 Vic 19)
TAS *Matrimonial Causes Act* 1860 (24 Vic 1)
VIC *Marriage and Matrimonial Causes Act* (28 Vic No 268)
QLD *Matrimonial Causes Jurisdiction Act* 1864 (28 Vic 29)
SA *Matrimonial Causes Act* 1867 (Act No 3 of 1867)
NSW *Matrimonial Causes Act* 1873 (36 Vic 9)

[2] *Matrimonial Causes (Expeditionary Forces) Act* 1919
Matrimonial Causes Act 1945
Matrimonial Causes Act 1955
Marriage (Overseas) Act 1955

[3] (1961) 107 CLR 529

[4] S.R. 1973 No. 8 of 18 January, 1973, p. 680.

[5] Parliament of the Commonwealth of Australia—Parliamentary Paper No. 134, 1974.

[6] Parliament of the Commonwealth of Australia—Parliamentary Paper No. 133, 1974.

[7] Evidence taken by the Senate Standing Committee on Constitutional and Legal Affairs on 11 September, 1974, see pp. 12 and seq.

[8] 1976 50 ALJR 594. (1976) FLC 90-039.

[9] Enacted as the *Family Law Amendment Act* 1976—No. 63 of 1976.

[10] No. 95 of 1976.

[11] No. 102 of 1977

[12] No. 23 of 1979.

Chapter 2

THE CONSTITUTIONAL LIMITATIONS OF THE JURISDICTION OF THE FAMILY LAW ACT

The Background to the Present Situation

2.0 The Australian Constitution empowers the Federal Parliament to legislate with respect to:

- 'marriage' (s.51 pl (xxi))
- *'divorce and matrimonial causes and in relation thereto parental rights and the* custody and guardianship of children' (s.51 pl (xxii))

2.1 These two constitutional provisions will be referred to hereafter as 'the marriage power' and 'the divorce power' respectively.

2.2 Apart from legislating' in relation to the marriages abroad first of Australian troops and then later of Australian citizens generally, and in relation to the domicile problems of deserted wives, the Federal Parliament did not exercise its constitutional powers with respect to marriage and divorce in any extensive way until 1959 when it enacted the Matrimonial Causes Act.[2] Prior to this legislative action by the Commonwealth, each Australian State had its own separate laws relating to divorce, as well as to such matters as the maintenance and custody of children, the maintenance obligation of spouses and matrimonial property.

2.3 By the *Matrimonial Causes Act* 1959, the Commonwealth not only established a single divorce law for the whole of Australia, but also provided for the determination according to federal law, of custody, maintenance and property proceedings between parties to a divorce if such proceedings were 'ancillary' to divorce proceedings. For such proceedings to be 'ancillary' to divorce proceedings and hence within the jurisdiction of the new Commonwealth Act it seems that it was only necessary that divorce proceedings between the parties either had been commenced or at some time in the past completed.[3] However, if no divorce proceedings had ever been commenced, disputes between married persons about the custody of their children or about property or maintenance matters did not come within the jurisdiction of the Commonwealth's Matrimonial Causes Act. Such disputes remained subject to the varying legislation of the States, as did other family law matters such as adoption and affiliation.

2.4 When in 1975 it replaced the Matrimonial Causes Act with the Family Law Act, *the Commonwealth attempted to bring within the federal jurisdiction not only custody,* maintenance and property disputes that were ancillary to a divorce, but all proceedings relating to:

- the custody, guardianship or maintenance of or access to a child of the marriage;
- the maintenance of one of the parties to a marriage;
- the property of the parties to a marriage or either of them.

2.5 Such proceedings could be brought under the Family Law Act in its original form at any time during the course of the marriage or after its dissolution, and it was not necessary that such proceedings be limited to the parties to the marriage.

2.6 *The constitutional validity of various aspects of the Family Law Act including* the extension of federal jurisdiction over custody, guardianship, access, maintenance and property disputes arising independently of divorce proceedings was challenged in the High Court in the case of *Russell* v. *Russell*.[4]

2.7 With respect to custody, guardianship or access proceedings or proceedings with respect to the maintenance of a child, the High Court held that such proceedings could validly be dealt with under a federal Act independently of divorce proceedings. However, the Court ruled that such proceedings could not involve parties other than parties to the marriage, although proceedings for the maintenance of a child could be brought by or on behalf of a child of a marriage against one or both of the parties to the marriage. Furthermore with respect to children, the High Court ruled that the only class of child with respect to whom proceedings could be brought under the federal Act was one who was the natural or adopted child of both parties to the marriage.

2.8 *Likewise with respect to proceedings for the maintenance of a party to the* marriage, the High Court held that such proceedings could validly be dealt with under a federal Act independently of divorce proceedings, provided such proceedings were limited to the parties to the marriage.

2.9 However, with respect to property proceedings the High Court ruled that such proceedings could only be validly brought under the Family Law Act if they were ancillary to divorce or other proceedings for principal relief.

2.10 As a result of the High Court decision in *Russell* v. *Russell* the Family Law Act was amended by the Family Law Amendment Act 1976:

- to limit custody, guardianship, access or maintenance proceedings brought under the Act to proceedings between parties to the marriage (save that proceedings for the maintenance of a child of the marriage may be brought by or on behalf of that child against one or both of its parents), (s.4 definition of 'matrimonial cause' para. c(ii) and para. (cb));
- to limit the class of children with regard to whom such proceedings could be brought to the natural and adopted children of the parties to the marriage (although the original extended concept of 'child of the marriage' which included ex-nuptial children who are members of the household, was retained for the purposes of s.63 of the Act, which requires that the Court be satisfied as to the welfare of any children of the marriage prior to a *decree nisi* becoming absolute) (s.5(1) and (2));
- to limit proceedings that might be brought under the Act with respect to the maintenance of a party to the marriage to proceedings between parties to the marriage (s.4 definition of 'matrimonial cause' para. (c) (i));
- to limit the property proceedings that might be brought under the Act to proceedings between the parties to a marriage 'with respect to the property of the parties to the marriage or of either of them, being proceedings in relation to concurrent pending or completed proceedings for principal relief between those parties' (s.4 definition of 'matrimonial cause' para. (ca)).

2.11 Subsequent to the decision in *Russell* v. *Russell* and the consequent amending legislation to the Family Law Act, there has been some further development in relation to the rights of persons other than the parents of a child to bring custody proceedings under federal law. In view of the High Court's ruling in *Russell* v. *Russell* that proceedings brought under the Family Law Act with respect to the custody of a child can only be between the parties to a marriage, a challenge was subsequently mounted in the High Court in the case of *Dowal* v. *Murray*[5] to that section (s.64 (4)) of the Act

which permitted a third party, who had the care and control of a child following the death of the parent in whose favour a custody order in respect of that child had been made to be a party in any custody proceedings brought by the surviving parent.[6] The High Court upheld the right of a third party to be a party to proceedings under the Act where such proceedings were in relation to previously completed custody proceedings between the parties to the marriage. On the basis of the High Court's decision in *Dowal* v. *Murray*, the Full Court of the Family Court in the case of *E* v. *E (No. 2)*[7] was able to make the following ruling in respect of the rights of third parties in relation to custody proceedings:

> The jurisdictional scope of the Act, as distinct from the constitutional limitations imposed by the marriage power prevents the institution of original proceedings for custody, guardianship or access in this Court, unless such original proceedings are between the parties to a marriage. But once an order for custody, guardianship or access has been made in proceedings between the parties to the marriage, proceedings which may properly be regarded as related to the earlier original proceedings, and therefore as coming within para (f) of the definition [of 'matrimonial cause'] are within the jurisdictional competency of this Court, even though they are brought by a person who is not a party to the marriage, and even though only one of the parties to the marriage is a party to such proceedings.

2.12 By way of background to the material which follows in this chapter, it should also be explained that when the Federal Parliament passed the *Matrimonial Causes Act* 1959 it did not establish any new court system to administer the new federal divorce law. Rather, the Matrimonial Causes Act simply invested the State Supreme Courts with federal jurisdiction to entertain divorce and ancillary matters according to that Act. Similarly, State Magistrates' Courts were invested with federal jurisdiction to determine certain ancillary matters under the Matrimonial Causes Act.

2.13 By contrast, the Family Law Act created a new family court, the Family Court of Australia, to administer what might be termed federal family law matters.[8] There remained, however, provision under the Family Law Act for State Magistrates' Courts to be invested with federal jurisdiction in certain limited areas.[9]

2.14 But in addition to creating a new federal court structure, the Family Law Act also contained provision for the creation of State Family Courts which would be invested with the necessary federal jurisdiction to administer the federal family law legislation. The Committee has been told in evidence[10] that each of the States was given the opportunity to establish a State Family Court late in 1975. Only Western Australia accepted that offer. The other States were again offered State Courts early in 1976 and yet again later in that year, but none accepted.

2.15 The situation therefore now exists that throughout Australia, save in the State of Western Australia, federal family law matters are dealt with in the federal court known as the Family Court of Australia, with some assistance from State and Territory magistrates exercising federal jurisdiction, while State family law matters are dealt with by the State court systems. In Western Australia, however, the Family Court of that State with some assistance from courts of summary jurisdiction outside the metropolitan area, exercises a complete and exclusive family law jurisdiction. This jurisdiction comprises that exercisable under the federal Family Law Act and that exercisable under all State legislation dealing with family matters.[11]

The Present Situation: the divided jurisdiction between Commonwealth and States in child custody and matrimonial property law

2.16 As a result of the High Court decision in *Russell* v. *Russell* and the consequent amendments to the Family Law Act, there now exists the following divisions of jurisdiction between the Commonwealth and the States in the areas of child custody and child maintenance law and matrimonial property law.

In the area of child custody and maintenance law:

- disputes between a married or divorced couple over a child who is the natural or adopted child of both of them, are within federal jurisdiction;
- disputes between a married or divorced couple over a child who is or was a member of the household but who is not the natural or adopted child of both parents, that is either a step-child or a foster child, are within State jurisdiction;
- disputes over a child whose parents have never been married, that is an illegitimate child, whether such disputes are between the parents of the child or between a parent of the child and a third party (e.g. a grandparent) will be within State jurisdiction;
- disputes between a third party (e.g. a grandparent) and the married or divorced parent or parents of the child over that child, will be within State jurisdiction, unless:
  - (a) one of the parents has had a custody order made in its favour in respect of that child and that custodial parent subsequently dies: in this case a custody dispute between the surviving parent and the third party will be within federal jurisdiction;
  - (b) in previous proceedings between the parents a custody, guardianship or access order has been made: in this case it seems on the authority of the Full Court of the Family Court in *E.* v. *E.* that proceedings between a third party and the parent or parents of a child over that child will be within federal jurisdiction provided the proceedings involving the third party 'may properly be regarded as related to the earlier original proceedings' between the parents.

2.17 In the area of matrimonial property law: disputes between a husband and wife about their property remain within the jurisdiction of State legislation and of the State Courts until divorce proceedings are commenced between the couple; but once divorce proceedings are commenced any property dispute between a husband and wife will become subject to federal legislation in the form of the Family Law Act and (except in Western Australia) subject to the jurisdiction of the Family Court of Australia.

2.18 When considering the present state of affairs in which State law will govern a matrimonial property dispute until divorce proceedings are instituted between the parties, it is important to bear in mind the distinction that exists between federal law and the law of the majority of the States in relation to the wife's indirect non-financial contribution to the family assets. Under the Commonwealth's Family Law Act (s.79) the court has a discretionary power to alter property interests as between a husband and wife. In exercising this discretionary power the court must take into account the indirect, non-financial contribution made to the acquisition, conservation or improvement made by a wife in her capacity of homemaker and mother. By contrast in determining property disputes between a husband and a wife under the legislation of all the States, except Victoria and Western Australia, the courts must apply the strict rules of law and equity under which it is not possible to take into account

non-financial contribution by a wife to the acquisition of the family assets. This lack of protection for a wife's non-financial contribution to property under the laws of the majority of the States can mean that a husband will have up to twelve months after he separates from his wife to dispose of property, the title to which is in his name, but to the acquisition of which his wife may have indirectly contributed.

2.19 However, in connection with this need to protect the interest of a spouse in family assets during the twelve month separation period, it should be noted that the Full Court of the Family Court has now held in *Seiling* v. *Seiling*[12] that once a marriage has broken down the court's power to grant an injunction under s.114(1) can be used to protect the incipient or inchoate right of a spouse to seek an order altering property interests under s.79 of the Act. The decision in the *Seiling* case over-ruled an earlier Full Court of the Family Court decision[13] to the effect that the injunctive provisions of the Act could not be used to overcome the lack of jurisdiction in the Family Court to entertain property disputes between spouses until divorce proceedings have been commenced.

2.20 Many submissions to the Committee[14] have drawn attention to these divisions of jurisdiction described above in the areas of child custody and matrimonial property law, and to the unfortunate consequences that these divisions can occasion for families in dispute. Indeed, it has been suggested that the constitutional fragmentation of family law is the most urgent problem facing the Committee.[15]

2.21 The lawyers of the Australian Legal Aid Office in their submission to the Committee have provided the following list of the undesirable effects of the divided custody and property jurisdictions.

—The involvement of many spouses in the cost, emotional trauma and inconvenience associated with separate proceedings in the Family Court of Australia and in State and Territory Supreme Courts or Magistrates' Courts—

- often forcing spouses to institute proceedings for dissolution of marriage in order to obtain a property settlement under the Act; and
- where children who are not natural or adopted children or both spouses are members of a household which includes others who are children of both spouses, unnecessarily drawing attention to the difference between such children and their siblings.

(ALAO lawyers are aware from their own experience that there are large numbers of children who, although they live as members of families, are not children of both spouses and are therefore not subject to the jurisdiction of the Family Court.)

—The promotion of unnecessary duplication of proceedings by making it necessary for parties to approach the court for interim or temporary relief until such time as the ground for principal relief becomes available or, alternatively, to take separate proceedings in a State or Territory Court. This substantially increases parties' costs (and in the case of legally aided parties the cost to the Government and therefore the community as a whole) and can disadvantage women especially, as the wife is often in a vulnerable position in relation to property if her marriage breaks down.

—A further disadvantage of the present limited jurisdiction conferred by the Act relates to custody proceedings which may be, and often are, issued and disposed of shortly after separation and before the ground of dissolution is established. Custody and occupation of the matrimonial home are very much intertwined and the ALAO lawyers are of the view that when the court is considering a sole custody order it ought to be able to adjudge with some degree of permanency the future occupation and ownership of the home in which the children are to continue residing.

2.22 Similarly, the Church of England Social Questions Committee has offered in its submission the following examples of 'the difficulties that have arisen, are arising and will continue to arise in future' with regard to illegitimate, step or foster children who are outside federal jurisdiction:

(i) A widowed mother of children remarries. The second marriage fails but the second husband wishes to obtain access to the children of the first marriage with whom he has built up a relationship during the second marriage. There is no power under the Family Law Act for him to claim an order for access and he would be forced to proceed in the Supreme Court under the Ward of Court proceedings.

(ii) A household consists of a child born during the marriage and a child born to one of the parents prior to marriage or born to the wife after marriage but not to the husband. For such a case the child born before marriage or after marriage but to a person other than the husband is not a child of the marriage and again jurisdiction in the Family Court does not exist.

2.23 With respect to these examples the Social Questions Committee concludes:

> In the circumstances such as have been outlined (which are not unusual) the parties are unable to have the questions of custody or access resolved in one court but are forced to seek redress in two courts. This will result in quite unnecessary legal costs as well as the ever present possibility that two separate judges, sitting in separate jurisdictions, could reach conflicting decisions which could result in the division of a family of children, who if the matter had been dealt with in one court, would probably have remained together.

2.24 When the federal Attorney-General introduced into federal Parliament the Bill to limit the jurisdiction of the Family Law Act following the decision in *Russell* v. *Russell* he expressed concern at 'the difficulties and hardships' that would be likely to be experienced by people as a result of the incomplete jurisdiction under the Act in the areas of custody and matrimonial property.[16] It would appear to this Committee from the submissions it has received, that 'the difficulties and hardships' foreshadowed by the Attorney-General as a result of the fragmented jurisdiction have become a reality.

2.25 It is now proposed to examine the various solutions that would appear to be available to the problems posed by the fragmentation of jurisdiction between the Commonwealth and the States in custody and matrimonial property law.

Solutions to the Problems of the Divided Jurisdiction in Custody and Matrimonial Property Matters

2.26 It appears to the Committee both from evidence that it has received and advice that it has taken, that the following courses of action are available as solutions to the problem of the divided jurisdiction that now exists—both as to legislative source and to administering courts—in the areas of child custody and matrimonial property law:

(1) a Reference by the States to the Commonwealth of the relevant legislative power;

(2) the establishing of State family courts (similar to the Family Court of Western Australia) which would administer both State and federal laws relating to children and property;

(3) the issuing of dual commissions to judges of the Family Court of Australia to enable them to exercise in addition to their powers under federal law any powers granted to them under State law;

(4) unilateral legislative action by the Commonwealth—which would test before the High Court the full extent of the Commonwealth's constitutional powers with respect to marriage and divorce; and

(5) a referendum to amend the Australian Constitution to give the Commonwealth full legislative power with respect to all children and to matrimonial property.

2.27 Before discussing the advantages and disadvantages of, as well as this Committee's attitudes to these various courses of action, it is proposed to give some brief explanation and/or background to the first four of the above listed courses of action. It is not proposed to discuss in detail the fifth course of action listed above, that is, a referendum. Since Federation nearly all attempts to alter the Commonwealth Constitution by formal amendment through referendum have failed. The Committee *therefore considers that in view of the difficulties experienced in the past with the* process of referenda it is not the preferred solution to the present jurisdictional problems in Australian family law. However, if the present jurisdictional problems cannot be overcome by other means then serious consideration would have to be given to the exercise of this option in view of the urgent need to find a solution to the problems in this area of the law. The Committee now considers the other four proposed solutions.

(1) Reference of Powers

2.28 A study of those submissions received by the Committee which have made recommendations concerning solutions to the problem of the divided custody and matrimonial property jurisdictions will reveal that the most favoured solution to this problem is a reference of powers by the States to the Commonwealth. However, the Committee has noticed that very little detailed or reasoned argument has been offered in the relevant submissions in support of the suggestion that a reference of power will provide the most satisfactory solution to the problem under consideration. It may well be that the popularity of the reference of powers proposal as a solution to the jurisdictional problem can be explained by the fact that such a reference has been under consideration for the last couple of years by the Standing Committee of the Federal and State Attorneys-General.

2.29 In 1975 and 1976 the Australian Constitutional Convention resolved as follows:

That this Convention recommends that the following matters should be the subject of reference power by the States to the Commonwealth:

(a) Illegitimacy—including family inheritance as it affects children who are legitimised by Commonwealth legislation (so as to achieve uniformity in law as between legitimate and illegitimate children);

(b) Adoption;

(c) Maintenance (other than in divorce proceedings).[17]

2.30 On 25 March 1977 the Standing Committee of Commonwealth and State Attorneys-General appointed a Committee to examine, *inter alia*, the implementation of that resolution.[18] On 8 April 1978 the Standing Committee announced that it had considered the form of a Bill to refer certain matters to the Commonwealth. The legislation would enable the Commonwealth to amend the Family Law Act to cover:

- the custody, guardianship and maintenance of ex-nuptial children and legitimate children of previous marriages; and
- property disputes between husband and wife arising out of the breakdown, or impending or likely breakdown of a marriage where relief in the Family Court is not presently available because the ground of divorce (12 months irretrievable breakdown) has not been established.[19]

Subsequently in January 1979 the Standing Committee announced that agreement was reached on the general principles of a draft Bill to refer the relevant powers.[20] It is understood that *neither Queensland nor Western Australia intend to refer the powers in* question to the Commonwealth.[21] The State Family Court of Western Australia already has the relevant powers conferred on it by the Family Court Act 1976 (W.A.). The Commonwealth Attorney-General announced in the Senate[22] that he would be prepared to recommend to the Government that it act on a reference of powers from some States only. The Committee draws attention to the stand taken by the Commonwealth Attorney-General on this matter and is of the opinion that the Commonwealth should continue to press this matter with the States notwithstanding that not all the States propose to refer powers.

2.31 *If the present negotiations between the Commonwealth and those States* proposing to participate in the reference can be successfully concluded, the first formal step towards effecting the reference will be for the States concerned to secure the passage through their own Parliaments of legislation in the form of the agreed model draft Bill. Once such State legislation is passed the Commonwealth will be able to amend the Family Law Act to the extent permitted by the reference.

(2) State Family Courts

2.32 It was pointed out in the first section of this chapter that very early in the life of the Family Law Act and on a number of subsequent occasions the option of State family courts was offered to each of the States, but that only Western Australia accepted the offer and proceeded to establish its own State Family Court. The Family Court of Western Australia administers both State and federal legislation pertaining to family law matters. This means that the inconvenient results that can arise for litigants elsewhere in Australia as a result of the decision in *Russell* v. *Russell* have not been experienced in Western Australia.

2.33 The Committee has been most impressed with what it has seen of the Western Australian State Family Court. However, although most submissions that discussed the problem of fragmented jurisdiction listed creation of State Family Courts among the possible solutions, none advanced it as the preferred solution to the problem. It is necessary also to note that the introduction of State Family Courts even if all States could agree to introduce them, is not a complete solution to the problem of fragmentation. In relation to appeals the situation in Western Australia is that an appeal lies to the Full Court of the Family Court from decisions of the State Court in the exercise of its federal jurisdiction, but to the Supreme Court of the State from decisions in exercise of powers under State family law legislation. Appeals from decisions of the W.A. Family Court must be taken in different appeal jurisdictions.[23] The possibility of a rival appellate jurisdiction to the Full Court of the Family Court exercised by the State Supreme Courts would appear to threaten the ideal of a uniform jurisdiction in family law throughout Australia. It would appear to strengthen the argument of those who perceive the State Court expedient as being inimicable to the ideal of uniformity.[24]

(3) Dual Commissions for Family Court Judges

2.34 In its submission and evidence to the Committee the Law Council of Australia proposed as one possible solution to the present jurisdiction difficulties, the issuing of dual commissions to judges of the Family Court of Australia thus enabling them to exercise in relation to their power under federal law any powers granted to them under State law.

2.35 A similar and more detailed solution has been suggested to the Committee by the eminent constitutional lawyer Professor P. H. Lane. Professor Lane terms his scheme 'a dual court scheme'. He does not use the term 'dual commission' in connection with his scheme but the Committee considered that the Law Council's proposal for dual commissions was, if not identical with, at least very similar to, Professor Lane's scheme.

2.36 Because of the relative novelty of Professor Lane's 'dual court' scheme and the fact that it is not included in the transcript of evidence of the Inquiry, the Committee considers that it ought to include as appendix 5 to this Report the relevant sections of the two Opinions which Professor Lane submitted to the Committee, outlining the details of his scheme. Basically, Professor Lane has proposed that a dual court system be built on the concept of the Family Court of Australia and the Family Court of Western Australia; the latter on the side of its State jurisdiction only. Under the proposal a Judge of the Family Court of Australia would be appointed in his personal capacity as a designated person by each State to constitute a part of the Supreme Court of the State to exercise jurisdiction in those family law matters beyond the reach of the Family Court of Australia.

2.37 The scheme would represent an amalgamation in the one dual court of the advantages of the uniformity of the Family Court of Australia with the 'gap-filling' jurisdiction of the Family Court of Western Australia.

(4) Unilateral legislative action by the Commonwealth to exploit to the fullest its constitutional powers to make laws with respect to marriage

2.38 The Committee is aware that there is a considerable body of opinion which maintains that the Marriage Act and the Family Law Act, that is, those statutes which comprise the present family law of the Commonwealth, do not exploit to the fullest extent possible the Commonwealth's powers under the Australian Constitution to make laws with respect to marriage and to divorce and matrimonial causes. Accordingly this body of opinion would argue that the Commonwealth should legislate to bring within federal jurisdiction those child custody and matrimonial property matters not presently the subject of federal legislation. If necessary, the validity of such new legislation and hence the extent of the Commonwealth's power with regard to marriage and divorce could then be determined by the Hight Court.

2.39 It is interesting to note that of the submissions to the Committee which support unilateral action by the Commonwealth to test the full extent of its legislative power with respect to marriage and divorce, some suggest that such action should be an interim measure pending the reference of powers; others that it is the course of action that should be pursued if the reference is not forthcoming; and yet others as a course of action to be pursued independently, and irrespective of the outcome of the proposed reference.

2.40 It is not proposed at this point to explore the details of the form of legislation that the Commonwealth might introduce on its own initiative to solve the present division of jurisdiction in custody and property matters. Given the somewhat technical legal details involved in any examination of possible unilateral legislative action by the Commonwealth in the areas of child custody and matrimonial property, it is proposed to devote a separate section later in this chapter to such an examination.

The argument for and against the solutions

2.41 In assessing the relative merits of the various solutions which have been outlined above to the problem of Australia's fragmented family law jurisdiction it is important not to overlook the fact that the solutions are not necessarily all mutually exclusive. There appears to be a tendency in discussion of these solutions to regard a reference of powers as a strict alternative to State family courts. This is a false approach. If there are any mutually exclusive solutions they are first between a reference of powers and unilateral but successful legislation by the Commonwealth to extend its family law powers, and secondly between State family courts and dual commissions. However, there would be nothing inconsistent in an extended Commonwealth jurisdiction in family law matters, accomplished by a reference of powers or by unilateral legislative action on behalf of the Commonwealth (or even by a referendum) being a jurisdiction administered either by State family courts or by federal judges invested with State commissions.

2.42 Having made this general comment the arguments for and against these various solutions will now be considered.

2.43 The strongest argument in favour of the reference of powers as a solution to the divided jurisdiction problem is that it will achieve greater uniformity both in principle and, provided that the existing structure of the Family Court of Australia is maintained, in administration of family law in Australia. Such uniformity would of course be achieved by a considerable extension of federal power at the expense of existing State powers, and this would be a forceful argument against a reference by those generally opposed to the concept of extended Commonwealth power. But at least in the case of a reference of powers the extension of Commonwealth power would be achieved through and with the co-operation of the States participating in it.[25]

2.44 However, probably the greatest reservations about the proposed reference of powers are:

- that it has not to date been possible to accomplish, despite two years of negotiation;
- that it remains an open question as to whether a reference of power once given can be withdrawn;[26]
- that it is already known that Queensland and Western Australia are unlikely to participate in it;
- that it appears that certain family law matters (e.g. adoption) will remain outside its scope.

It will be appreciated that the third and fourth factors just outlined undermine considerably the hope of attaining, by means of the reference, uniformity of family law jurisdiction It was put to the Committee that the reference could become a source of further division and problems within family law, if only some States participate.

2.45 The most cogent argument in favour of State family courts as a solution to the divided jurisdiction problems, is that such courts will provide a single forum in which can be litigated all family law matters irrespective of whether they are the subject of State or federal jurisdiction. Further support for State family courts is also provided by the apparent success of the Western Australian experiment. But of course the mere fact that a State Family Court is successful in Western Australia is no guarantee that had State family courts been initially established elsewhere or were they to be established in the future elsewhere, they would be as successful as in Western Australia.

2.46 One of the strongest arguments that has been put to the Committee against State courts is that they defeat uniformity, both as to legislation and as to practice. Examples were given to the Committee of the serious lack of uniformity in practice that developed under the Matrimonial Causes Act. That Act, it will be recalled, was a federal Act applying in all States but administered by the State courts.

2.47 Perhaps the greatest practical difficulty in the way of establishing State courts at present is that there is already in operation the Family Court of Australia. The Committee has been warned on many occasions of the difficulties that would be involved in dismantling this present structure.[27]

2.48 There is yet another obstacle to the erection of State family courts which must not be overlooked, and this is, that to establish State family courts would require the co-operation of the States. To date no State except Western Australia has been willing to accept a State family court. It does seem that certain of the acknowledged shortcomings of any scheme to establish State family courts would be overcome in the solution to the jurisdiction problem offered by dual commissions for Family Court judges or by the 'dual court' system proposed by Professor P. H. Lane. For example the uniformity of practice offered at present by the Family Court of Australia would be maintained by such a scheme; while the problem of dismantling the present federal court system which would arise if any decision is taken to establish State family courts, would not occur if such a dual court or commission scheme were adopted.

2.49 But again, as with State family courts, a dual court or commission system would require the acceptance by and co-operation of the States. The attitude of the States to such a proposal has not been tested. The Committee wrote to all State Premiers seeking advice as to where the State in question stood in relation to different proposals for solving the problem of fragmented jurisdiction. Although submissions were received from the Attorneys-General of Victoria, New South Wales, South Australia and Western Australia, the only State prepared to submit publicly on this policy aspect was the State of Western Australia.

2.50 An attempt by the Commonwealth to solve unilaterally the present gaps in its jurisdiction in family law matters would, if it were upheld as constitutionally valid by the High Court, have the advantage of creating uniformity as to source of law and, on the assumption that the existing structure of the Family Court of Australia were retained, to administration of the law. Such a solution could, however, suffer from the disadvantage of not being achieved with the agreement or co-operation of the States. Again, like the reference of powers, it will be unpopular with those who wish to maintain the existing balance of Commonwealth and State legislative powers. Further, there would be delays and uncertainties in proceedings in this area of the law while the full extent of the Commonwealth's constitutional power with respect to marriage and divorce is being determined by the High Court.

The Directions in which the Commonwealth might legislate to Exploit to the Fullest its Legislative Powers with respect to Marriage and Divorce

2.51 It has already been pointed out in this chapter that there is a widely held view that to date the Commonwealth has not legislated to exploit to the fullest its constitutional powers with respect to marriage and divorce. According to such reasoning it would be open to the Commonwealth to pass legislation which would solve the jurisdictional difficulties with respect to children and property and which would be constitutionally valid. A number of directions which such Commonwealth legislation might take have been suggested to the Committee; these legislative possibilities will now be examined.

(1) Children: the rights of third parties

2.52 In earlier sections of this chapter it has been explained that the limitations originally believed to have been imposed by the *Russell* decision on the rights of third parties to bring proceedings with respect to children have been considerably reduced as a result of subsequent case law, (that being the cases of *Dowal* v. *Murray* and *E* v. *E*). However, it is clear that there remains an element of uncertainty and a need to spell out in the legislation the rights of third parties as they have been suggested in the case law. It has been put to the Committee that legislative action should go beyond what has already been suggested in the cases and permit third parties to bring proceedings with respect to the custody, guardianship of, or access to children, irrespective of whether litigation between the child's parents has been previously commenced. This matter is discussed in greater detail in paras 4.54-4.57 of the Report.

(2) Children: re-introduction of the original definition of 'Child of the Marriage'

2.53 It is the definition of 'child of the marriage' in s.5 of the Family Law Act which determines the class of children in respect of whom custody, guardianship, access or maintenance proceedings may be brought under the Act.

2.54 The definition in the Act as originally passed included not only the natural and adopted children of the parties to a marriage but also any child adopted by either party since the marriage, with the consent of the other, and a child of either party if at the relevant time that child was ordinarily a member of the household of the parties to the marriage. The Matrimonial Causes Act (s.6) contained a virtually identical definition of children who might be subject to ancillary proceedings under that Act; the validity of that definition was never challenged.

2.55 However, in the *Russell* case, Mr Justice Mason in a judgment, the terms of which—because it was effectively the majority judgment—became the order of the High Court, held that that class of children with respect to whom proceedings under the Act could be brought, should be limited to the natural and adopted children of the parties to the marriage. However, no reasons were given for the limitation of the definition.

2.56 It is (a) because no reasons were given for the limitation imposed on the definition of child of the marriage in the *Russell* decision and (b) because of the acceptance for so long of the very similar definition in the Matrimonial Causes Act, that suggestions have been made both in submissions to the Committee[28] and elsewhere[29] that the extended definition of 'child of the marriage' as it originally appeared should be re-inserted in the Act and its constitutional validity should then be fully and specifically argued before and determined by the High Court.

2.57 A re-insertion of the original definition of 'child of the marriage' which was held to be constitutionally valid would only bring within the scope of the Act, step-children or foster children. It would certainly not bring within the scope of the Act disputes concerning the custody or maintenance of an illegitimate child (that is, a child whose parents had never been married) who had never been a member of a household of a married couple. A substantial number of submissions[30] to the Committee have argued that illegitimate children should be brought into the scope of federal jurisdiction. A method by which this might be done will now be examined.

(3) Children and Property: the definition of Marriage

2.58 The Committee has considered the possibility of a re-definition of marriage in federal legislation to bring within federal jurisdiction certain *de facto* unions. The effect of bringing such unions within the concept of marriage would be that children born to such unions would be subject to federal law. It would also be possible by this means to extend the benefits of federal matrimonial property law, which recognises a wife's non-financial contribution to family assets, to women in *de facto* unions. Such women at present have recourse only to State law in any property dispute with their *de facto* partner. State law does not as a general rule recognise such non-financial or indirect contribution by a *de facto* wife.[31]

2.59 It seems to the Committee that it is certainly within the power of the Commonwealth Parliament to define and describe the status of marriage, and that it may well be within Commonwealth power to define a number of classes of marriage and to attach different rights to different types of marriages.

2.60 However, there are a number of substantial difficulties with the proposal to re-define marriage to include certain *de facto* unions. Chief among these difficulties were the questions as to what is the community's concept of marriage; would the community tolerate a re-definition of marriage even for limited and honourable purposes (e.g. the purpose of giving greater protection to children of these unions); would it be right to re-define marriage so as to bring within the definition those couples who have deliberately chosen a *de facto* relationship in preference to a marriage? Very little is known of community attitudes and there has been very little public discussion of possible Commonwealth intervention in this area. On balance, therefore, the Committee was not inclined to seek a re-definition of marriage to include *de facto* unions as a means of resolving the present jurisdictional problems.

(4) Property: the possibility of a matrimonial property regime to be introduced by the Commonwealth pursuant to the Marriage Power

2.61 It has been put to the Committee that the federal Government could legislate pursuant to the marriage power to establish a system of matrimonial property between spouses. If this were done there would then be jurisdiction under federal legislation to deal with property disputes arising at any time during the course of the marriage.

2.62 Arguments in favour of the Commonwealth legislating for a matrimonial property regime are contained in a number of submissions. For example Professor (now Mr Justice) Nygh, having urged that serious consideration be given to the introduction of some form of community property in Australia, states:

> In my submission it is possible for the Commonwealth Parliament under its marriage powers in placitum (xxi) (of s.51 of the Constitution) to provide that upon marriage and by virtue of the marriage, the parties should acquire certain interests in the joint property or in property acquired since the marriage.

2.63 In the submission of the Judges of the Family Court of Australia it is stated:

> There is, however, a view held by some Judges that the Family Law Act in its present form, does not fully exhaust the extent of the Commonwealth legislative power in respect of the property of the parties to marriage. Analysis of the reasons given by the High Court in the *Russell* case, and, in particular the judgment of Mason J., suggests that there may be power to legislate in respect of property which has been acquired or is used for the purposes of the marriage e.g. the home and its contents, the family car or business partnership between the parties.

2.64 In the *Russell* case the reasoning of Mr Justice Mason was particularly important because it was his decision that in fact became the order of the High Court. In his judgment Mr Justice Mason explained Federal Parliament's 'marriage power' in the following terms:

> . . . notwithstanding the existence of (the divorce power), the marriage power enables the Parliament to provide for the enforcement of such rights, duties and obligations as may be created in exercise of the marriage power . . . So understood, the power may be exercised by providing for the enforcement of rights of maintenance, custody and property by proceedings separate and independent of proceedings for annulment or dissolution of marriage.[32]

2.65 Applying this interpretation of the marriage power Mr Justice Mason was able to uphold as a valid exercise of that power, the jurisdiction conferred by the Family Law Act to determine proceedings relating to children and maintenance proceedings between spouses, independently of divorce or other proceedings for principal relief (subject to the limitation that such proceedings must only be between parties to a marriage). However, because the Act did not limit the property that might be the subject of proceedings to property in some way incidental or related to the fact of marriage, the attempt to confer jurisdiction on such property proceedings could not be said, according to Mr Justice Mason, to be an exercise of the marriage power. Rather, it had to be regarded as exercise of the 'divorce power'. Therefore such property proceedings had to be ancillary to proceedings for principal relief, and accordingly limited to the parties of the marriage.

2.66 In chapter 5 the Committee will consider the case for the introduction to Australia of a Matrimonial Property Regime including the case for such a regime limited in content to the matrimonial home. At this point in this Report the possibility of a Matrimonial Regime is raised only as a means by which the Commonwealth might legislate to overcome the present gaps in its jurisdiction over matrimonial disputes.

The Committee's View and Conclusions

2.67 This Committee attaches great importance to co-operation between the States and the Commonwealth. It would therefore prefer to see a solution or solutions to the difficulties of the fragmented jurisdiction in Australian family law that are agreed to by both federal and State governments and that are adopted in a spirit of mutual co-operation. Nevertheless, this Committee is convinced of the urgent necessity of solving problems of the fragmented jurisdiction in custody and matrimonial property matters without further delay. Furthermore, it is convinced of the need for uniformity as far as possible in our family law system—uniformity both in legal principles and in their administration.

2.68 The Committee considers that, notwithstanding reservations brought to the attention of the Committee about the proposed Bill to refer the relevant powers it is a solution to the divided jurisdictional problem that can achieve greater uniformity both in principle and, provided that the existing structure of the Family Court of Australia is maintained, in administration of family law in Australia. Further, the extension of Commonwealth power would be achieved through and with the co-operation of the States participating in it.

Recommendation 1

2.69 *The Committee therefore recommends that the proposed reference of powers from the States to the Commonwealth in the outstanding areas of children and property be proceeded with as a matter of urgency. The Commonwealth should proceed to enact legislation in this regard on the recommendation of a majority of States, if agreement of all States proves impossible to procure.*

Recommendation 2

2.70 Whatever results from the reference of power, *it is recommended that the Commonwealth move to amend the Family Law Act to exploit to the fullest extent its legislative powers with respect to children, the rights of third parties and re-introduction of the original definition of 'child of the marriage'.*

Recommendation 3

2.71 *It is recommended that the Commonwealth move to amend the Family Law Act by relating the jurisdiction in respect of matrimonial property disputes to the marriage power. It is proposed that the property jurisdiction be limited to require:*

(i) *the proceedings to be between the parties to the marriage;*

(ii) *that the dispute relates to the property or proprietary claims of either party;*

(iii) *that the claim arises out of the marital relationship, or arises by reason of the fact that the parties are married;*

the Committee believes that such legislation would survive testing of its validity in the High Court. This Committee considers that the Commonwealth will certainly have no other choice but to so legislate if, in addition to refusing the reference of powers, the States will not co-operate in a scheme of dual commissions or courts if such a scheme is possible and the matter cannot be resolved by formal amendment through the referendum.

2.72 In the Committee's view the Commonwealth and indeed the State governments have a duty to ensure as far as is reasonably possible that, the ordinary citizen is not inconvenienced, when his/her domestic problems reach the point of litigation, by the technicalities of Australian Constitutional Law and the federal–state relationships. What the Committee wishes to emphasise is that the results of the decisions in *Russell* v. *Russell* and *Farrelly* v. *Farrelly* have had grave consequences in this area of the law. In the Committee's view it is imperative that a solution to the problems that have arisen in this area of the law be found so that the difficulties and hardships that have been experienced as a result of the incomplete jurisdiction under the Act in the areas of custody and matrimonial property, can be prevented.

Recommendation 4

2.73 In conclusion, the Committee considers that the possibility of joint commissions for federal judges or of a dual court system along the lines suggested by Professor Lane should also receive thorough examination by both the Federal and State Governments. Accordingly, *the Committee recommends that the Governments of the States and the Commonwealth examine the possibility of issuing State Commissions to federal Family Court judges and federal Commissions to selected State judges to enable the exercise of a unified jurisdiction in family law matters throughout Australia.* Even if the proposed reference of powers is achieved there will remain certain family law matters within State jurisdiction. It seems desirable to the Committee that even though it may not be possible constitutionally for all family law matters to be subject to federal legislation, the situation should be achieved whereby

the same judges hear and determine both State and federal family law matters. While State family courts may be a means of establishing such a single forum, the Family Court of Australia is in existence. In the Committee's opinion it would require very grave reasons to recommend the dismantling of the existing federal court system. The Committee considers that the alternative solutions considered in this chapter, including the option of attempting to alter the Commonwealth Constitution by formal amendment through the referendum, would enable the serious gaps in the present jurisdiction of the family court to be overcome.

ENDNOTES

[1] *Matrimonial Causes (Expeditionary Forces) Act* 1919
Matrimonial Causes Act 1945
Matrimonial Causes Act 1955
Marriage (Overseas) Act 1955

[2] The *Matrimonial Causes Act* 1959 was followed two years later by the Commonwealth's *Marriage Act* 1961, which dealt with the formalities of marriage and legitimation of children and the crime of bigamy. All of these matters had previously been the subject of separate legislation.

[3] See for example the case of *Lansell* v. *Lansell* (1964) 110 CLR 353 the case in which the constitutional validity of the 'property proceedings' section of the Matrimonial Causes Act was upheld, in that case the property proceedings were commenced 14 years after the parties were divorced.

[4] 1976 50 ALJR594.

[5] 1978 FLC 90-516.

[6] Sub-section 61(4) was subsequently amended by the *Family Law Amendment Act* 1979 to permit a third party *to initiate* proceedings for custody of that child following the death of a parent who had a custody order for that child.

[7] 1979 FLC 90-645.

[8] Under s.31(1) of the Family Law Act, the Family Court of Australia has jurisdiction in:
(a) matrimonial causes instituted or continued under the Family Law Act;
(b) certain proceedings instituted or continued under the Marriage Act;
(c) matters arising under a law of a territory concerning—
(i) the adoption of children;
(ii) the guardianship, custody or maintenance of children;
(iii) payment under affiliation and the like orders;
(d) any further matters in which jurisdiction is conferred on it by the parties.

[9] s.39(6) (a)-(c).

[10] See the evidence of the Family Law Council to the Committee (transcript p. 29).

[11] *Adoption of Children Act* (1896-1977) (WA)
Guardianship of Children Act 1972 (WA)
Married Persons and Children (Summary Relief) Act 1965-1972
Child Welfare Act 1947-1977.

[12] 1979 FLC 90-627.

[13] *McCarney* v. *McCarney* 1977 FLC 90-200.

[14] Law Council; A.C.O.S.S.; New South Wales C.O.S.S.; National Council of Women; National Marriage Guidance Council of Australia, J N Turner; J Wade, W.E.L. Tasmania, Professor (now Judge) Nygh, South Australian Government; Springvale Legal Services; V C O S S ; Victorian Women's Refuges, Young Liberal Movement of Australia (NSW); Family Law Practitioners' Association of New South Wales; Law Consumers' Association; Fitzroy Legal Service, Queensland Law Society, Office of Women's Affairs, A.L.A.O., The Women's Council of the Liberal Party (SA); Law Society of South Australia; Church of England Social Questions Committee; The Judges of the Family Court of Australia; Professor D. Hambly; Professor H. Finlay; W.E.L. (Australia).

[15] Submission by J. N. Turner.

[16] R. E. Ellicott—2nd Reading Speech, *Hansard*, 20 May 1976, p. 2327.

[17] Proceedings of the Australian Constitutional Convention, Hobart, 27-29 October 1976, pp. 48-68.

[18] At this meeting on 1 July 1977 the Standing Committee of Attorneys-General directed Commonwealth and State officers to:
- draft for consideration by State and Commonwealth governments a model Bill to refer to the Commonwealth power to deal with matters of family law now not covered by the Family Law Act;
- examine the possibility of a Family Court of Appeal composed of members who hold commissions simultaneously from the Commonwealth and the States; and
- consider the feasibility of the establishment of State Family Courts.

The subject of the model Bill would cover disputes:
- between husbands and wives over children of only one of them;
- over custody and maintenance of ex-nuptial children; and
- over matrimonial property where there are no divorce proceedings between the parties.

[19] Second Annual Report of the Family Law Council, 1978 pp. 6-7. Press Release by the Attorney-General, 8 April 1978.

[20] Third Annual Report of the Family Law Council, 1979 p. 7.

[21] Ibid.

[22] Parliamentary Debates Vol. s.76 p.1031.

[23] Evidence pp. 5565-5566.

[24] Other matters: In 'Three problems concerning the property provisions of the Family Law Act, 1975-78 (WA)' Family Law Seminar, The University of Western Australia, May 1979, A. F. Dickey discusses three problems in relation to property matters that have resulted from the present division of jurisdiction over family law between the State and the Commonwealth.
The three problems concern:
- the extent to which the property provisions of the Family Court Act are inconsistent with the Family Law Act;
- the position when one spouse applies for State property relief in the Family Court of Western Australia and the other then applies, or has already applied, for the same or associated relief in another court in Western Australia. (Contrast this with the situation where there is an actual or potential conflict between State and federal jurisdiction):
  Tansell v. *Tansell* (1977) FLC 90-280;
  Reynolds v. *Reynolds* (1977) 2 NSWLR 295;
  McLean v. *McLean* (1978) FLC 90-502;
- application to alter property interests in the Family Court of Western Australia exercising Federal jurisdiction following a previous alteration of those interests by that court exercising State jurisdiction.

[25] Proceedings of the Australian Constitutional Convention Hobart, October 1976. Mr Walker (NSW) in his speech to the convention said at p. 53:
The beauty of referral of power is that it is an almost unique example of a situation where the most effective and rational approach to a problem would require the lowest input of financial and human resources.
Nor does it, unlike constitutional amendment forever bind the States.
And for those who favour State Family Courts, referral combines the possibility of State courts exercising jurisdiction over uniform family laws.

[26] For a discussion of some of the issues to which a reference of power gives rise, see a recent article by Mr Justice Ludeke. The Reference of Industrial Powers from the States to the Commonwealth, Mr Justice J. T. Ludeke, ALJ, vol. 54, February 1980, p. 88.
Note also: Proceedings of the Australian Constitutional Convention, Hobart, 27–29 October 1976, pp. 48-68.

[27] For example: Evidence pp. 29, 44-48, Submission to the Committee by the Judges of the Family Court, para 99. Note also: Family Law Council 2nd Annual Report 1978, paras 173, 174.

[28] See for example submissions of A.C.O.S.S.; Young Liberal Movement of Australia (NSW); Office of Women's Affairs—Department of Home Affairs.

[29] Family Law Council in its First Annual Report (para 43).

[30] See for example: A.C.O.S.S.; NSW C.O.S.S.; National Council of Women; National Marriage Guidance Council of Australia; W.E.L., Tasmania; Professor (now Judge) Nygh; Victorian Women's Refuges; Law Consumers' Association; Church of England Social Questions Committee.

[31] See for example *Allan* v. *Snyder* (1979) FLC 90-656.

[32] See 50 ALJR 594 at 612.

Chapter 3

DISSOLUTION AND NULLITY OF MARRIAGE

3.0 In this chapter it is proposed to consider the first two terms of reference for the Inquiry together as it is considered that the discussion which each provokes is closely related. It will be recalled that until the enactment of the Family Law Act dissolution of marriage could only be obtained in Australia under section 28 of the Matrimonial Causes Act which specified 14 grounds on which a court could grant a decree of dissolution. It was also open to the court at the suit of a party to a marriage to grant a decree of nullity which was a declaration that a marriage was void because of some impediment to the parties or either of them contracting the marriage in the first place or because the marriage was voidable for reasons set out in the Act.

The Grounds of Divorce as Currently Provided

3.1 The Family Law Act changed the law by specifying in s.48 that the sole ground for dissolution of marriage is the irretrievable breakdown of marriage. Such breakdown can only be established by satisfying the court that the parties separated and thereafter lived separately and apart for a continuous period of not less than 12 months immediately preceding the date of filing of the application for dissolution (s.48(2)). A decree shall not be made if the court is satisfied that there is reasonable likelihood of cohabitation being resumed. (s.48 (3)).

3.2 Section 49 provides that separation may be held to have occurred notwithstanding that it resulted from the action or conduct of one of the parties. Separation may also be held to have occurred and continued notwithstanding that the parties continued to live in the same home or that either performed some household services for the other (s.49 (2)). Section 50 provides that if the parties after separating, resumed cohabitation on one occasion for up to three months before separating again, the period of separation before and after may be aggregated for the purposes of proving the ground for divorce. Section 50(2) permits the court to overlook an insubstantial interruption to that one permitted period of resumed cohabitation.

3.3 At the time the Bill was before Parliament and in the course of this Inquiry, considerable attention has been directed to the provision of the Act relating to the ground of divorce. Whilst the provision is regarded by many as a notable social advance, it is still regarded by some as an innovation that threatens the stability of the family with the potential to undermine the moral structure of the nation. A third group considers that the legislation is as yet untried. In this view the experiment with the no fault single ground approach is still at an early stage and the full implications of the change made to the divorce laws will not be apparent for some time yet.

3.4 The arguments of both the vocal proponents and opponents of the concept of no fault divorce very much involve the interpretation of demographic data and such sociological material as is available concerning marriage and the family. The Committee has therefore sought to marshal the available demographic and sociological information. Accordingly, it commissioned a paper from Kathleen M. Jupp, an experienced demographer recently retired from the U.N. Fund for Population Activities, which sets out such information as is thought to be significant in those areas relevant to the discussion. The paper is attached as appendix 3.

The Development of the Concept of No Fault Divorce

3.5 The movement in Australia towards a different approach to divorce and matrimonial causes was influenced by events overseas. In the United Kingdom there have been since the early 1950s a number of important Inquiries, the conclusions of which had influence in Australia. The climate for change was influenced by the policy of the courts which were prone to examine the realities behind the externalities of the case being brought. This was revealed in a more flexible approach to the exercise of discretions where the petitioner was also guilty of a matrimonial fault. In the Report of the Committee on One Parent Families, under the Chairmanship of Sir Morris Finer (The Finer Report) it was stated that:

> . . . about one third of all petitioners in the mid-1960s asked for discretion to be exercised in their favour.[1]

3.6 The House of Lords as early as 1943 had enunciated the considerations which a court should have in mind when exercising discretion:

> . . . the court should have regard to (a) the position and interest of the children of the marriage (b) the interest of the party with whom the petitioner has committed adultery, with special regard to their future marriage, (c) the question whether, if the marriage be not dissolved there is a prospect of reconciliation between the spouses, (d) the interest of the petitioner, particularly as regards allowing him to re-marry and live respectably, (e) the interest of the community at large judged by maintaining a true balance between respect for the binding sanctity of marriage and the social considerations which make it contrary to public policy to insist on the maintenance of a union which has utterly broken down.[2]

3.7 This decision reflected an increasing trend towards the courts looking at the question of breakdown of the marriage in determining whether to grant a decree of divorce. As the Finer Committee observed:

> These criteria were essentially incompatible with a divorce law whose central tenet was punishment and reward. Thus the seal of highest authority was placed on what was by this time the practice of the courts attaching great importance to the fact of breakdown. There is nothing to be found about breakdown in the grounds of divorce as enacted by Parliament. But the reality was that thousands passing through the divorce courts were obtaining consensual decrees under a system in which they were theoretically prohibited. Over ninety percent of petitions were undefended.

3.8 The position taken by the Church of England with regard to divorce was extremely influential in relation to the movement for a change from matrimonial offence to the concept of marital breakdown. The Church had argued that the doctrine of the matrimonial offence was 'entirely in accord with the New Testament' and that 'divorce was a very dangerous threat to the family and to the conception of marriage as a life long obligation'. The attitude of the Church underwent a change between 1956 when it had given its evidence to the Royal Commission to 1966 when it published *Putting Asunder*. This was revealed when the Archbishop of Canterbury set up a group to examine the circumstances and implications of population growth in parts of the world of special concern to the Church overseas so as to enable the Lambeth Conference of 1958 to make a clear statement of attitude to contraception. The Report under the title *The Family in Contemporary Society* reached the conclusion that the Church of England needs to ensure that the theological positions that it took were not contaminated by out of date sociological ideas. In regard to the family it concluded that in Britain:

> *Far from disintegrating, the modern family is in some ways in a stronger position than it has* been at any period in our history of which we have knowledge.[3]

3.9 It was commented in the Finer Report that the notable inconsistencies between

this statement and the evidence of the Church to the Morton Commission required the latter to be discarded and with it went the special attachment of the Church to the matrimonial offence. This led the Archbishop of Canterbury to commission a special report on the concept of marital breakdowns to assist the Church in determining its position when Mr Leo Apse introduced into the House of Commons a Private Member's Bill to allow divorce on 7 years separation.

3.10 The Archbishop of Canterbury announced that he wished to consider 'a principle at law of breakdown of marriage'. He convened a group of churchmen, lawyers and laity 'to try to discover whether it would be possible to frame a law of marriage not based upon the matrimonial offence but based upon the law of breakdown'. In regard to the existing law the group concluded that 'as a piece of social mechanism the present system had not only cut loose from its moral and juridical foundations; it is quite simply inept'. The group's report, published in 1966 as *Putting Asunder* stated:

> We are far from being convinced that the present provisions of the law witness to the sanctity of marriage, or uphold its public repute, in any observable way, or that they are irreplaceable as buttresses of morality, either in the narrower field of matrimonial and sexual relationships, or in the wider field which includes considerations of truth, the sacredness of oaths, and the integrity of professional practice.[4]

3.11 The group recommended that the notion of breakdown of marriage should be substituted for the matrimonial offence as the basis of divorce law. The U.K. Law Commission in the same year published a commentary on *Putting Asunder* which focussed attention on the range of choice and practical possibilities for change: *The Report and Reform of the Grounds of Divorce: The Field of Choice*.[5] Drawing the distinction between marital breakdown and divorce, which is fundamental, the Law Commission emphasised that the divorce rate cannot be used as a measure of the number of broken families. It went on to make its much quoted statement that a good divorce law should:

- buttress rather than undermine the stability of marriage;
- when regrettably, a marriage has irretrievably broken down, enable the empty legal shell to be destroyed with the maximum fairness and the minimum bitterness, distress and humiliation;
- be understandable and respected. It is pre-eminently a branch of law that is liable to affect everyone, if not directly at any rate indirectly. Unless its principles are such as can be understood and respected it cannot achieve its main objectives.[6]

3.12 This Report led to changes in the law in England in 1969 with the passage of the *Divorce Reform Act 1969* and clearly influenced those responsible for drafting the *Family Law Act 1975*.

3.13 In Australia, courts were also finding an embarrassing rift between the law's requirements and the realities of most divorces. This was particularly so in regard to the requirement for discretion statements. The discretion statement was a confidential document to assist the court in determining whether a petitioner filing for divorce has committed adultery in which particulars of the acts of adultery committed since the marriage were set out, together with the circumstances giving rise to those acts. The grounds on which the court was asked to exercise its discretion in favour of the petitioner were required to be verified by affidavit and filed in a sealed envelope. It was opened by the judge at the time of the hearing but it was not normally available for general perusal. However, the court has power to authorise the disclosure or make it available for inspection in a proper case.[7] Writing in 1969 of the Matrimonial

Causes Act, Finlay and Bissett-Johnson after noting some bizarre consequences of the discretion-statement requirement such as the propensity of some parties in divorce proceedings to file fictitious statements that they had committed adultery with persons of prominence 'with whom they may not even have any personal acquaintance' observed:

> As long as the law proceeds on the assumption that one party is more at fault for the breakdown of the marriage than the other party it may be important to safeguard the position of such an innocent spouse and to enable that spouse to be the divorcing party if he or she deserves to do so. Once breakdown of marriage becomes the sole criterion for dissolution, however, the question at issue will not be the relative guilt of the parties, but rather the marriage itself will become the object of the Inquiry and the discretion statement can then be laid to rest.[8]

3.14 It is interesting to note the observations of Mr Justice Fox, sitting in the A.C.T. Supreme Court[9] that from inquiries made at his request it appeared that no case could be found in New South Wales or Victoria where relief had been refused on the discretionary ground of the petitioner's adultery in the previous two or three years and no one was able to recall any such case in the Supreme Court of the A.C.T.

The Report of the Senate Standing Committee on Constitutional and Legal Affairs

3.15 The new approach to divorce embodied in the Family Law Act received a thorough examination by the Senate Standing Committee on Constitutional and Legal Affairs and by both Houses when the Family Law Act was before the Parliament. In its Report to the Senate in October 1974, the Senate Committee stated that it had given serious consideration to the question of the ground or grounds for divorce and to the concept of 'no fault' and 'fault' divorce. The Senate Committee saw as its major task, the determination of the question as to whether or not the fact of irretrievable breakdown, evidenced by separation of the parties should replace other existing grounds as the sole basis for dissolution, and if so, what period of separation should be required. In its interim report, tabled in the Senate on 24 September, 1974, the Committee stated that 'from the submissions it had received and oral evidence taken on the general reference, a remarkable consensus had emerged that the then existing grounds for divorce based on a notion of matrimonial fault in one or other parties to the marriage were out of date and should be replaced by a new ground of irretrievable breakdown'.

3.16 From evidence considered by the Senate Committee during its examination of the specific clauses of the Bill it appears that most persons and organisations with interest in, or experience of the operation of the *Matrimonial Causes Act* 1959, favoured the transition to the no fault concept expressed in the Bill.[10] Gallup polls conducted during 1973 showed that 79% of those polled supported the proposition that if a husband and wife tell the court that their marriage is broken a divorce should be granted. The granting of a divorce after twelve months was favoured by 85.2% of respondents to that poll.

3.17 The Senate Committee noted that a few submissions were made supporting the retention of fault grounds and opposing any basic change in the grounds of dissolution. These submissions were particularly concerned that the divorce law should not weaken the institution of marriage. However, the Senate Committee conceived its duty to be to determine how best the stability of a marriage may be buttressed and yet, when it has irretrievably broken down, how best it may be dissolved with the maximum of fairness and the minimum of bitterness, distress and humiliation. The Senate Committee unanimously reached the view that:

> the provision of irretrievable breakdown of a marriage, based on a period of separation as the sole ground for divorce would be proper and in the public interest. When applied in the context of a broadly-based Family Court, the introduction of no fault grounds would, in the Committee's view, bring a degree of honesty and dignity to the administration of Australia's national divorce law.

The Impact of the Family Law Act on the Institution of Marriage and the Family

3.18 Those who have followed the debates that have occurred in Australia in connection with the law as it relates to marriage and divorce, the family and morality, will be well aware that this is a value laden area. In discussing the issues that arise for consideration in connection with the grounds upon which divorce should be granted, the impact that such laws have on marriage and the family, it is difficult to compromise and accommodate all shades of opinion. To illustrate our dilemma, it is only necessary to set out some of the contradictory statements that have been placed in evidence before us concerning the effect that the Family Law Act has had on the institution of marriage and the family. These statements have been made consistently by various groups who have made submissions to the Committee and are set out as follows.

> **'Easy divorce damages the institution of marriage'.** The main points raised under this heading were that the Act encourages people to look on marriage as a temporary arrangement, that there is no commitment to permanency and that it is the function of law to buttress the stability of marriage. It is also argued that marriage has suffered as evidenced by the numerical increase in divorces since the Act became operational.
>
> **'The Act is damaging to families'.** Statements under this heading refer to divorce leading to the breakdown of family life and the weakening of our social and economic structure creating a serious threat to our national security; to children of divorced parents becoming emotionally deprived and insecure; and to the Act failing to take account of the special role of women and undermining their position and well-being in the family.
>
> **'There is a contradiction within the Act in strengthening marriage and yet enabling dissolution to occur more readily'.** Several groups argue that s.43 provides for preservation and protection of the institution of marriage, whereas s.48 enables this protective function to become destabilised by dissolution.

3.19 Statements which have been submitted by those supporting the present provision are set out below.

> **'The Act has not affected existing attitudes'.** Proponents of this view contend that there is no evidence of any adverse effect and that in fact the Act has strengthened prospects for reconciliation or for a more satisfactory resolution of conflict, which is beneficial to all parties. An increased rate of divorce only reflects more accurately the incidence of marriage breakdown in the community.
>
> **'The Act reflects changes in attitudes'.** Those who have based their arguments on this view stress that the Act is a reflection of more tolerant community views, that reasons for turning away from orthodox marriage are deeply rooted in the socio-economic structure of society and that it enshrines a new 'voluntary' principle of marriage in which both parties are volunteers.
>
> **'The Act has improved family life'.** Many groups support the notion that a humane divorce law serves to protect the family by improving the home environment for children, promotes the re-formation of family units, enabling conflict to be resolved constructively, stressing reconciliation and encouraging mutuality of responsibility for the union and for the children.

3.20 An essential question confronting the Committee is whether it is possible to prevent marriage breaking down by making divorce difficult to obtain. The distinction between marriage breakdown and divorce is quite fundamental to the consideration of this question. There is ample evidence that where divorce is difficult or impossible to obtain, marriage breakdown is still a significant and observed phenomenon. It is considered that in order to develop constructive policies to support the principles as set out in section 43 of the Family Law Act, what is required is more information concerning the causes of marital breakdown. Once these causes have been established the possibility of developing relevant policies will arise.

3.21 It was evident from the submissions we received that there was little if any consensus about the meaning of terms like marriage and the family. Any definition of the family is notoriously difficult and will vary depending on the purpose for which the definition is required. Where the purpose is the payment of benefits under the social security system for instance, the determinant is presence of dependent relatives and children. So defined, it is taken to include many living arrangements that are not marriages in the legal sense. Marriage is not defined in the Marriage Act but there is a definition in ideal terms in section 43 of the Family Law Act which speaks of the need to preserve and protect the institution of marriage as the union of a man and a woman to the exclusion of all others, voluntarily entered into for life. This is clearly not an operational definition. It does not say what marriage is but what marriage ought to be. There appears to the Committee to be a definite need for some agreed basis upon which debate about marriage and the family can proceed: a 'need to devise some comparability of approach, not rigid uniformity, in various kinds of inquiry, on what is a family and on the age at which a child ceases to be a child, on styles of families that are sociologically significant in this country and on relationships between the style of family and the development of family members'.[11]

The Committee has concluded:

- There is no necessary coincidence between the number of marriages that have broken down and the number of divorces. The effect of easier availability of divorce has the effect of closing the gap between the number of marriages that have broken down in fact and those that are dissolved at law.[12]
- The absence of divorce cannot be taken necessarily to indicate the absence of marital breakdown but information is not currently available to measure the gap.
- In Australia the long-term trend of divorce is moving in an upward direction. This trend preceded the introduction of the Family Law Act. The large increase in applications for divorce in 1976 has not been sustained and has fallen each year since the introduction of the Act.[13]
- In the early 1970s the proportion of both men and women marrying was exceptionally high. People were marrying younger and increasing proportions married in all age groups in the range 15 to 49 years. This trend, which had been observed in other developed countries in the fifties and sixties, had drawn in to marriage almost all those available for marriage, including some who had no evident vocation for it. The potential for marital breakdown and for decisions to divorce has been built up by the very popularity of the institution of marriage.[14]
- It is not possible to predict the likely future trend of the Australian divorce rate because of factors that have recently emerged, the full significance of which it is too early to assess. These possibilities include an apparent fall in the number of marriages and an increase in age at marriage. If these trends are confirmed then the possibility will be raised that tendencies may be eliminating from the ranks of the married some of those who were at high risk for divorce, such as couples marrying before age 20 and brides pregnant at marriage.
- The proportions married in Australia are very high, despite recent downturns. One apparent reason for this is the propensity of those divorcing to remarry.
- Data does not exist to establish whether or not there are significant trends towards *de facto* relationships or other alternatives to marriage. There is a clear need to measure the incidence and outcome of such unions.
- Attitudes to marriage and childbearing, so far as they have been measured, are on the whole favourable to marriage, opposed to early immature marriage and the risk of breakdown.
- As a social institution marriage remains popular and appears to be evolving and adapting to meet the requirements of the population. Among the factors influencing such changes as are occurring researchers have noted:
  - the effect of unemployment which may be causing deferment of marriage. deferment of childbearing and which may increase the attraction of *de facto* relationships;
  - greater participation of women in the workforce appears to be affecting the timing and spacing of child-birth and affecting the roles and relationships within families;
  - higher material expectations of families which could be influencing decisions about family size;
  - new expectations of the psychological and emotional rewards of marriage lead to more frequent decisions to separate where needs are not being met.

3.22 It is very difficult on the basis of existing data to reach firm conclusions about the state of the family in Australia at the present time. As Kathleen Jupp noted in appendix 3:

> What seems most important is that both the institution of marriage and the family unit have been profoundly modified in function by demographic changes, on the one hand, and social and technological changes on the other.

The Committee does not doubt that the family remains 'the natural and fundamental group unit of society' which the Family Law Act describes. What is needed is more objective data to assist those responsible for the formulation of policy in regard to the family so that it can be supported adequately to fulfil the role which society expects of it. This understanding of the family is important in respect of many areas of government policy. The Committee particularly welcomes the establishment of the Institute of Family Studies, with its capacity to undertake research. The Committee draws attention to the recommendations as to the kind of research that is required (contained in para. 1.20 of appendix 3). These recommendations are fully supported by the Committee. It is considered that the Institute of Family Studies should be provided with every possible assistance to implement its research program which will provide answers to many outstanding questions about the state of the family in Australia today.

3.23 Consideration of the material made available to us in chapter v of appendix 3 inclines us to the view that the provisions of the divorce law are not a significant factor influencing family stability and breakdown. Research should now focus on events, which are recognised as causing stress. Some of the particular points in the life cycle which researchers have identified as occurring at particular stress points in the cycle of a marriage are as follows:

- the arrival of the first and successive children;
- their going to school and leaving home;

- the departure of the last child from home leaving spouses alone in the family with the possibility, given current fertility and demographic patterns, of a long period of child free marriage.

3.24 These matters are discussed in chapter iv of that appendix. It is concluded that the policy thrust should be in the direction of observing and recording typical behaviour so that there can be effective intervention to assist those experiencing marital distress. To this end, studies should be mounted of the cohort type described in chapter iii of appendix 3 which would monitor the experience of a given generation over the duration of a statistically significant sample of marriages:

> The transition from the predominance of families with a large number of children to a situation where the majority of married couples have only two or three children cannot be adequately traced from cross-sectional data. This aspect of reproductive behaviour can be more adequately assessed by rearranging the time-period data so that they reflect the experience of new aggregates, the cohorts. Two types of cohorts are generally used in demographic analysis of fertility: birth cohorts (generations) or aggregates of women born in the same year or small number of sequential years; the marriage cohorts or aggregates of women married in the same year or sequential years.
>
> In each instance, cumulative measures of marital fertility may be derived; although the distinction between the two types of cohorts leads to important differences between the measures. The cumulative marital fertility of a birth cohort (generation) is an aggregate measure reflecting the reproductive experience of a group of women who were ageing at the same pace but who varied with respect to their age at marriage and, consequently, had experienced different marriage durations when they reached a specified age.[15]

Information obtained from studies such as this would assist Marriage Guidance Organisations (as they are currently called) to develop appropriate programs related to the needs of couples at known points of stress, or, would be geared to anticipate problems that are known to arise at given points of marriages. The matter is considered further where we discuss the work and role of Marriage Guidance Organisations and the Court Counselling Service.

Approaches to Support the Institution of Marriage

3.25 Many submissions we have received have objected to section 48 because they consider that it makes divorce too easy. These submissions have been received from church based organisations and from people with a strong religion based aversion to divorce, who are concerned that marriage should not be entered and forsaken lightly. The Committee shares the concern that marriage be supported and that steps be taken to ensure the stability of marriages. In our view there is a role for family law in supporting an ideal and stable view of marriage. It is our view, however, that in the past too much emphasis has been placed on the deterrent effects of the provisions of the divorce law as a factor influencing the stability of marriage. It will be seen that the approach favoured by the Committee is that more emphasis should be put on marriage and the obligations that it entails.

Recommendation 5

3.26 *Those considering matrimony should be apprised of the responsibility involved in that State and consequences that will result from marriage breakdown. As a means of highlighting this approach the Committee recommends that the Marriage Act and the present Family Law Act be consolidated.* It could then be more complete as a Family Law Act and would indicate more clearly the intention of relying on the marriage power to support the provisions of the Family Law Act. It is incumbent on marriage celebrants to provide intending marriage partners with pamphlets setting out

in straight-forward terms the consequences of marriage.[16] The Committee has been informed that this pamphlet is not as extensive as was originally intended. We take the view that ill-advised marriages and impetuous divorces will be more effectively deterred if the consequences as regards property and other rights upon divorce are known in advance of marriage. Those experiencing marital stress and seeking assistance with their problems should have available to them services that can help them at the relevant time. In chapter 10 we make recommendations regarding these services.

3.27 In summary the Committee has enunciated briefly here and elsewhere in some detail in the body of the Report a number of new positive proposals which the Committee concludes will strengthen marriage by encouraging parties to enter into it with a more detailed knowledge of its consequences. Parliament and the Government should support the institution of marriage and support family stability by obtaining data concerning the realities of marital relations, and as a result, develop appropriate social and economic policies to assist and support the family generally and those experiencing matrimonial distress in particular. The Committee's proposal for early counselling and support should further enhance the capacity of the Family Court and associated services to assist in resolving situations where actual marriage breakdowns have occurred. The Committee sees these initiatives as being an important contribution to reform in the family law area. This issue presented the Committee with its greatest and most difficult dilemma as there was no single line of reasoning which convinced the Committee to reach its conclusions. The following discussion will outline the principal arguments advanced in the submissions which discussed the question of grounds. Some of the changes proposed are supported by some but not all members of the Committee.

Submissions Concerning the Grounds for Divorce

3.28 Some members remain convinced that the changes made to the law in 1975 were detrimental to the institution of marriage and the stability of the family. Others consider that the changes to the law were necessary at the time and have worked well in practice. Others continue to have an open mind on the matter and would reserve that final verdict until the Act has been in operation long enough for its social effects to be assessed. The argument for the inclusion of fault grounds in section 48 has been justified by the Cardinal Archbishop of Sydney, His Eminence, Sir James Freeman, in the following terms:

> Legislation, in practice, gives, especially to young couples about to marry, very little sense of a strong community support for the integrity of the state of life they are entering. The legislation enables the process of separation to begin immediately after the celebration of marriage and to be completed 12 months later. Such a provision certainly does not imply that marriage is a step in life which the community through its laws wishes to be seen as serious or permanent.
>
> The Act has by its divorcing provision failed to buttress the stability of marriage and family life and has effected a basic change to all marriages including those which existed prior to the operation of the Act. The practical effect of the Act has been and will be to create an image of marriage as an arrangement terminable at the will of either party with or without the consent of the other party, after a short period of separation. This must have growing influence on the minds of those who are planning to marry as to the relationship they are entering and influence the way they prepare for it and the manner in which they react to problems which arise.[17]

3.29 Those who oppose the 1975 reform adopt the following positions:

- That the Act fails to buttress the social institution of marriage or to give effect

to any of the stated objectives as set out in section 43. Thus by making divorce easier, couples experiencing problems in their marriage resort to divorce as a solution rather than attempting to reconcile their differences.

- It is suggested that if the family is, as section 43 asserts, 'the natural and fundamental group unit in society' that fact should be recognised by society's laws. Similarly, if marriage is a life-long and exclusive union of a man and a woman, then this law hardly buttresses that principle by making it terminable at the will of one of the parties to the marriage simply by the establishment of a 12 months separation period.
- The fact that divorce can be obtained unilaterally by one or other of the parties to a marriage is particularly opposed. A party not wishing his or her marriage to be terminated is powerless to influence the situation and must accept the consequences.
- It is contended that the Act does not entitle the 'innocent' party opposing the termination of his or her marriage to obtain any redress, as the question of fault or blame for the breakdown of the marriage will not be regarded as relevant in determining rights to children or property unless it is specifically relevant to the question of property or custody on issue.
- It is alleged that by failing to provide parties with a forum to ventilate the issues that divided them in marriage, the law has shifted the scene to disputes over children and property which have, as a result, become increasingly acrimonious and intractable.
- Opponents of the principles of the Family Law Act have campaigned for a divorce law that will once more place on society, through its judges, responsibility for determining the question of whether a divorce should be granted. They have sought the re-introduction of criteria similar to the old matrimonial offences which a party seeking a divorce would need to establish in order to obtain a divorce. Divorce on the basis of consent if accepted would only be available after the expiration of much longer separation periods (ranging from 3 to 5 years), often with a requirement that the parties have actively sought reconciliation. In this view adultery as well as other serious misconduct should be a ground for immediate divorce.
- A compromise position which was considered as an amendment when the Family Law Bill was before the House of Representatives would allow dissolution on the basis of 12 months separation provided both parties agreed, extend the separation period to two years where it was defended, and provide a ground for instant divorce for serious matrimonial misconduct. There is also a body of opinion that would favour the extension of the separation period to two years.

3.30 The changes implemented in 1975 are supported by many submissions that the Committee has received. In particular they receive the support of organisations representing those most involved in the administration of the law, such as the Judges of the Family Court, the Family Law Advisory Committee of the Law Council of Australia, marriage guidance and counselling agencies, Councils of Social Services and other community bodies. Those who support retaining the present criteria for dissolution have argued that:

- The need for reform of the law of divorce was established at the time of introduction of the reform and the indignities, hypocrisies, expenses and delays associated with the old system based on grounds were notorious and that a return to such a system in whole or in part would be a social disaster.

- There is no evidence to suggest the the 1975 reform has had a detrimental effect on the stability of marriage or resulted in a higher incidence of marriage breakdown.
- Whilst the reform certainly resulted in more divorces, this was hardly surprising given the restrictive nature of the old law and trends well in evidence before the law was introduced.
- Restrictive divorce laws would not in any event arrest the social trends towards marital instability but might result in pressure that may in fact, increase the trend towards alternatives such as cohabitation outside marriage.
- As a social objective, community resources should be directed towards positive rather than negative objectives. Thus the emphasis should be on the provision of services to facilitate mediation and conciliation between parties in disputes that affect their present and future lives rather than to simply provide a forum and an arbitrator to adjudicate on who was to blame for the past. The aim of the law should be to facilitate constructive negotiations between the parties so as to minimise both the short and long-term consequences to society of marital breakdown.

3.31 The Committee has considered the implications of changing the existing grounds for divorce set out in section 48. It is concluded that the following are the principal approaches that might be considered:

Substitution of an Inquest for an Objective Test to prove Irretrievable Breakdown

3.32 The suggestion that there should be a full inquest into each marriage in which dissolution was sought was considered and rejected by the U.K. Law Commission in *The Ground for Divorce: The Field of Choice*. The reasons for its rejection were essentially that the resources and costs that would be involved in conducting an inquest into every marriage where a divorce is sought would not be warranted in terms of desirable social outcome. It was considered that the responses of the law should be directed to the issues of most concern and importance to the parties; their future life and the lives of their children.

3.33 The problem with an objective test of 12 months separation for many people is that a party who wishes to resist the dissolution of his or her marriage is relatively powerless where the other party is determined to end the marriage. It is said for instance, that this provision not only enables divorce by consent but divorce by repudiation. This has led to charges that the law does not sufficiently protect the interest of the 'innocent' party. Whilst not denying that the process for divorce is often more hurtful and damaging personally and financially to one party than another, the concept of innocence and guilt are not considered helpful. It would be infrequent that an inquest into a marriage would establish the clear innocence or guilt of one or other of the parties to it in respect of the breakdown. In the few cases where this was possible it would not necessarily follow that such a finding would provide a complete basis for determining ancillary matters such as custody where other criteria, such as the interest of the child, are of more importance.

3.34 A general inquest could only be justified if there was some hope of restoring good personal relationships between the parties and thereby preserving the marriage. Such procedures are clearly outside the competence of courts.

The Objective Test: *Additional means of proof*

3.35 The argument that it should be possible to establish irretrievable breakdown by facts other than 12 months separation was accepted in England and Wales and found expression in the *Divorce Reform Act 1969*. This Act abolished all the old grounds for divorce and replaced them by one ground: that the marriage had irretrievably broken down. This may be established only by the proof of one or more of five facts set out in the Act. Three of these are akin to but not identical with the old grounds of adultery, cruelty and desertion and therefore impute fault to the respondent. The other two are periods of separation: two years if the respondent consents to the granting of a decree of divorce and five years if he does not. The Act abolished the old bars to divorce but safeguarded the respondent where a period of separation was relied on. The respondent may apply for a decree not to be made absolute until adequate financial provision is made for him/her and in the case of a five year separation the respondent may oppose the granting of a *decree nisi* on the ground that the divorce will result in grave financial or other hardships to him or her.

3.36 During the debate on the Family Law Bill there was support for proposals to amend the Bill by retaining the provision that irretrievable breakdown should be the only ground for divorce, but adding a range of methods by which irretrievable breakdown could be proven. The range included alternative periods of separation depending on whether or not both parties consented to the divorce and proof of conduct by a spouse which, as defined, substantially resembled some of the repealed grounds based on fault. An argument commonly advanced was that victims of particularly reprehensible conduct should not be required to wait for a year before seeking a divorce, especially if they are unable to separate from the offending spouse without prejudicing the housing and general financial position of themselves or their children.

3.37 This view was expressed in an amendment moved to section 48 by Mr (now the Hon.) R. E. Ellicott, when the Family Law Bill was under consideration in the House of Representatives. The amendment proposed that the ground for irretrievable breakdown should be held to have been established if, and only if, the court was satisfied that:

(a) the parties separated and thereafter lived separately and apart for a continuous period of not less that 24 months immediately preceding the date of filing of the application for dissolution of marriage; or

(b) the parties separated and thereafter lived separately and apart for a continuous period of not less than 12 months immediately preceding the date of filing of the application for dissolution of marriage and each party genuinely desires the application to be granted; or

(c) having regard to the behaviour of the parties the marriage has in fact broken down irretrievably.

The amendment was lost by only one vote in the House of Representatives.

3.38 The Committee has noted that since 1975 there have been proposals for reform of the Matrimonial Causes Act, 1973, (UK) to replace the existing provision, with one ground for divorce namely irretrievable breakdown of marriage established by 12 months separation. The reform has been advocated in a discussion paper prepared by the Family Law Sub-Committee of the United Kingdom Law Society, entitled: *A Better Way Out*.[18]

3.39 Commenting on the present english law with its range of 'facts' upon which divorce may be procured the Law Society Committee observes:

- that the law is presently framed as an inducement to collusion because parties genuinely wanting a divorce prefer to contrive a ground for immediate divorce than wait for the separation period to expire;
- that the requirement that parties must allege fault grounds in a petition exacerbates tensions and hostility in the relationship and creates an atmosphere unfavourable to negotiations;
- that the complexity and cost of proceedings are greater under a system which requires 'facts' such as cruelty and desertion to be proved than where a single separation ground is required.

3.40 The Committee will have occasion later in this Report to refer to the importance of negotiation in the settlement of custody and financial questions between the parties. A priority for a modern divorce law should be to create the most favourable climate for negotiation between the parties. Such a climate is not created by a divorce law which invites or encourages the parties to 'blame' each other for the past or to adopt intractable positions, or to introduce irrelevance into the negotiations. More importantly the divorce law should avoid 'built in advantages' to either party that would prejudice the outcome of free negotiation. To preserve different separation periods depending on whether or not spouses formally join in the divorce application, places a strong bargaining weapon in the hands of the spouse who has the less urgent desire for the divorce. There could also be a risk of injustice, not only as between spouses, but also as between parents and children, in arrangements affecting maintenance, property, custody and access made under the pressure of a threat to prevent a marriage from being dissolved until the longer separation period has expired. Similarly the availability of 'grounds' such as cruelty and adultery can be used by a vindictive spouse to affect the outcome of bargaining, by possibly involving third parties or by subjecting the other spouse to a humiliating catalogue of his or her frailties. The basis on which dissolution can now be granted in the Family Court does not permit the parties the opportunity to involve one another in such scandalous allegations. Consequently, the inclusion of an immediate ground which would be a fault ground would injure the prospect of negotiation.

3.41 Another argument for an immediate ground for divorce is that there are cases where the conduct of one of the marriage partners has been so intolerable and reprehensible that the union should be capable of instant dissolution. The argument for such a remedy in urgent cases would be more persuasive if the separation period were longer than 12 months. When the Act was before the Senate Committee the provisions of section 114, which provided for injunctive relief, were perceived as providing adequately for the needs of women and children exposed to the danger of violence and as sufficient to protect the interests of one of the parties in property or to enable the court to make interim provision for the welfare of children. Following the decision in the *Russell* case, and without any reference of power from the States, there must be considerable reservations concerning the efficacy of section 114. We consider that if the amendments we propose in chapter 6 were adopted the provisions would be more effective. It would be unfortunate in the Committee's view if the problem of protecting wives under threat of violence could only be overcome by introducing a more immediate ground for divorce.

Extension of the Separation Period

3.42 Much emphasis in the past has been placed on reconciliation provisions in divorce legislation. Such provisions have not generally proved effective in practice. There was an expectation largely unrealised, that the Family Court would involve itself

in the work of reconciling those bent on divorce. The work of the Family Court is in the area of conciliation rather than reconciliation and its resources have been deployed very largely in the service of clients in disputes over issues of custody, property and maintenance: in matters attendant on the fact of divorce. Reconciliation is to be understood as the action of re-uniting persons who are estranged; whilst conciliation is coming to denote, as it should, the process of engendering common sense and reasonableness in dealing with the consequences of estrangement. In a later section of the Report we discuss the administrative arrangements that should apply as between various services to facilitate reconciliation and conciliation and to ensure that such services are available earlier than is presently the case.

3.43 It is necessary to recall that as originally conceived, the Family Law Act comprised an integrated approach to the question of divorce. The provision of the no fault ground based on separation (which may be by consent) or the unilateral decision of one party that the marriage has broken down, was to be accompanied by services which the Family Court would provide. The concern finds expression in the emphasis placed by the Senate Committee on there being a geniune separation period, or cooling-off period, of 12 months (before presenting an application) to enable reconciliation to take place; the provision of section 48(3) that a decree of dissolution of marriage shall not be made if the court is satisfied that there is a reasonable likelihood of cohabitation being resumed; and in the provision of section 50 enabling short periods of resumed cohabitation to be subracted from the separation period. It appears to have been assumed that the Family Court would provide a reconciliation as well as a conciliation service to separating couples.

3.44 The evidence presented to the Committee by Marriage Guidance Councils, the Court Counselling Service and those professionally engaged in marital therapy suggests that the distinction should be very clearly drawn between reconciliation and conciliation. The point at which separating couples make contact with the Family Court is at a stage where, on balance the opportunity for effective reconciliation has passed. The attached table taken from the Marriage Guidance Council annual report gives an indication of how the possibility of reconciliation decreases as the separation extends.

State of Marriage:	*If both partners attended*		
	Relationship Improved	*Only personally helped*	*Negative outcome*
No conflict	90.0	5.0	5.0
Some conflict	84.5	9.4	6.1
Severe conflict and separation contemplated	58.4	21.3	20.3
Living apart under six months	45.3	30.2	24.4
Living apart six months and over	22.7	31.8	45.5

3.45 It should be noted that the effectiveness of reconciliation diminishes the longer the couple remain separated. Many of the submissions proposing changes to the ground have advocated some extension of the period of separation; the argument being that this would enhance the possibility of reconciliation. Our evidence suggests that this assumption is not supported by the experience of those most closely involved with separating couples. Marriage Guidance Organisations have on the whole, reported that the period of 12 months is appropriate and should not be extended. Some submissions have advocated extension of the period of separation from 24 months in some cases, to

36 months, to apply in most cases. It would be hard to justify extension of the period of separation on the basis that more reconciliations would be achieved if the evidence of those working in the area of marital therapy is accepted. If such a provision were to apply in all cases the effect would be to make divorce harder to get than was the case under the Matrimonial Causes Act. For this reason it is usually accompanied by a recommendation for the inclusion of grounds such as adultery or intolerable behaviour for instant divorce. The effect of the inclusion of these provisions would be to re-introduce the concept of fault into the law of divorce.

3.46 An extension of the separation period would also exacerbate the jurisdictional problems resulting from the decision in the *Russell* case that the Family Court jurisdiction in property disputes does not arise until application for dissolution has been filed. The problems that this has given rise to are discussed in chapter 2 and elsewhere in the Report.

3.47 If the period of separation were to be extended as proposed to a blanket period of 24 or 36 months it would be impossible in our view not to make special provision for immediate divorce in certain cases. This would inevitably re-introduce some element of fault. The combination of an immediate fault ground and a longer separation period could easily result in many parties colluding to obtain a fault divorce. This has been the experience as was noted earlier. If this were the result it would seem to defeat the purpose of extending the separation period to facilitate reconciliation as parties who were agreed on divorce would be able to obtain their dissolution even sooner than it is possible for them to do now. This is particularly the case if adultery is accepted as one of the grounds. There are some who have asked for the inclusion of adultery as a ground because their religious beliefs allow for no other basis for divorce. If adultery as a ground were available to people with special as well as no special religious convictions it would have the effect of reviving fault, to which for reasons already given, we are opposed. Adultery is to many the pre-eminent matrimonial offence and a peremptory ground for divorce. It has traditionally been so regarded. But it cannot necessarily be regarded as evidence of irretrievable breakdown of a marriage. Many marriages survive acts of adultery by either party or both parties. If the policy of the law is to restrain impetuous divorce then it is considered that the policy would not be aided by providing a peremptory ground such as proving an act of adultery.

3.48 However, we consider that the law ought to encourage separating couples to seek assistance with their marital problems. One suggestion made to the Committee was that a variable separation period should be included. If the parties sought counselling, then 12 months separation would suffice. If the couple did not seek counselling, then an 18 month period would apply. This has about it a suggestion of coercion. Marital therapists on the whole oppose the inclusion of any element of compulsion in counselling. The effectiveness of their overall work is likely to be diminished if they are required to be involved in cases where the parties are simply meeting the requirement of the law by attending counselling. This is an objection currently made in relation to section 14 of the Act. For these reasons the Committee does not support the suggestion.

3.49 The constitutional problems have led to submissions for the provision of an additional ground for divorce that would enable the jurisdiction of the court to be invoked at an earlier stage. Some submissions have recommended the inclusion of an additional ground for relief besides nullity or dissolution. In some submissions such as those of the Law Council of Australia and N.S.W. Family Law Practitioners' Association, it was merely to overcome constitutional limitations on the court's

jurisdiction. Others have sought an amendment that would permit the court to grant decrees of judicial separation. This has been perceived by some observers as an answer to jurisdictional problems but it has also been put forward on behalf of those who, for religious or other ethical reasons, do not approve of divorce but wish to invoke the jurisdiction of the court to determine ancillary matters that might be in issue between them. The Committee is aware that under the Matrimonial Causes Act it was possible for a party to employ a remedy of judicial separation as a strategy so as to deny a divorce to the other spouse. This would be used to affect the outcome of negotiations which the Committee believes is an essential component in the dissolution process. If such a provision is introduced it should only be available on the joint applications of both the spouses concerned and not as a device to deny dissolution to one of the parties.

3.50 An important question is whether the decree of divorce should be made absolute while the parties to the marriage remain in dispute over ancillary matters. Under the Matrimonial Causes Act it was required that all these matters be initially raised in the divorce petition and the final decree was not pronounced until there had been an initial determination of the ancillary matters. As originally drafted it was anticipated that under the Family Law Act the Family Court would be able to deal with these matters during the separation period. However, this was upset by the decisions in the *Russell* case with regard to property.

Maintenance and custody proceedings can be brought at any time under the Family Law Act though it is usual for the disposition of contested custody to be deferred until after the decree of divorce is made. The Committee considers it desirable that there be an initial determination of ancillary matters by the Family Court before the decree of divorce is made absolute (see chapter 7).

3.51 As related in paragraph 3.27 the Committee is divided on the question of grounds for divorce. A majority believes that at the present time there should not be a change to section 48. Some members accept the reasoning outlined as a full and complete justification of the 1975 changes, other wish to await the outcome of work of the Institute of Family Studies and a longer period of operation in order that the effects of the Act might be more fully assessed.

Recommendation 6

3.52 Nevertheless, *the Committee is able to recommend that there be no change to the provisions of the Act relating to grounds for divorce.*

ENDNOTES

[1] Finer Vol 1. p. 77.
[2] *Blunt* v. *Blunt* (1943) AC 517.
[3] *Putting Asunder: Divorce for Contemporary Society*, SPCK 1966 at p. 32.
[4] Ibid. at p. 380.
[5] CMND 3123, 1966.
[6] Ibid. p. 7.
[7] Finlay & Bissett-Johnson, *Family Law in Australia*, 1972 p. 373.
[8] Ibid.
[9] *Pertoldi* v. *Pertoldi* (No. 2) 1969 14 FLR 176.
[10] op.cit.
[11] See appendix 3 p. 14.
[12] Ibid. at p. 102.
[13] Appendix 3, paras 1.04 and 3.22ff.
[14] Appendix 3, paras 1.05 and 3.12.

[15] Annexure 2 of appendix 3.
[16] *Marriage Act* 1976 (Cwth)—section 42(5A).
[17] Cardinal Freeman in his submission to the Committee gave his support for s.43 and stated that s.48 should be amended to make the breakup of a home the last resort when all possible means have been tried and it has been shown on reasonably objective grounds that the irreparable breakdown has, in fact, occurred.
[18] Family Law Sub-committee of the Law Society (UK)—*A Better Way Out*—New Chapter Press, January 1979.

Chapter 4

CHILDREN: CUSTODY AND WELFARE

4.0 It is still the case that in the majority of divorces the question of custody rights is determined by the separating couple themselves not by the court. Two-thirds of divorce cases where children are involved proceed under s.63(1) of the Family Law Act with the court, after brief inquiry, consenting to the arrangements agreed to by the parties themselves. In respect of the remaining third of cases initially disputed, settlement is reached with the assistance of court counsellors in about half. The remainder involve a dispute which is arbitrated and determined by order of the court. Research[1] to which our attention was directed revealed that:

- a large proportion of fathers are content to allow the mother to have the custody of the children;
- where the matter is fully defended there is an increasing tendency for custody to be awarded to the father;[2]
- the status quo, that is to say the existing placement of the children, was infrequently disturbed by order of the court.

4.1 The researchers concluded that a typical custody case is one where the wife in a separating couple applies for sole custody of children who are living with her, and is granted custody by consent. The matter of access, whether the father has applied or not, is left to the couple and their advisers to work out.[3] An important conclusion of this study was that:

> Irrespective of whether they become fully defended or not, cases in which both parents applied for custody showed numerous other signs of difficulties in the continuing relationship between the separating couples and, therefore, appear to deserve special attention at an early stage from court counsellors.

4.2 It appears that most separating couples are able, eventually, to reach agreement between themselves in the disposition of custody. Fully contested matters with which the court is required to deal, however, occupy a great deal of the working time of the court and its officers. The solutions produced are not readily accepted by the parties because they are imposed. These cases give rise to further proceedings involving questions such as obstruction of access and variations to orders already made. Some cases require supervision of court orders by court counsellors. In many cases serious problems of enforcement arise.

4.3 Concern has been expressed by many witnesses about the backlogs and delays in the disposition of custody cases by the Family Court. The backlogs and delays are happening mainly in the Melbourne and to a much lesser extent, in the Sydney and Brisbane registries of the court. A number of reasons are advanced to explain these delays. It would certainly appear that there has been an increase in the number of contested custody cases since the Family Law Act was introduced. To some extent the increase can be explained by social changes. For instance, it was not common for fathers to contest custody against mothers under the Matrimonial Causes Act. This was because decisions of the court suggested that the mother would generally be the preferred custodian of young children. In these times, fathers appear more ready to accept the responsibility for raising young children and courts more readily accept them as suitable custodians. Under the Matrimonial Causes Act the party with the less

urgent desire for a divorce possessed a bargaining weapon which could be used to induce the other spouse to grant favourable settlement terms in return for the divorce and the right to re-marry. The fact that husbands were usually obliged to carry the cost of the divorce of both parties in the days before legal aid, resulted in an understandable reluctance on their part to litigate their rights. Another explanation for the backlogs was the slowness of the Government's response in providing the Family Court with resources. The build-up of judges, court registrars and counsellors, did not keep pace with the amount of business before the court in its first 2 years of operation. The reader is referred to chapter 7, paras 7.22 to 7.23. Delays beget further delays, arising from the need for the Family Court to deal with urgent applications which occupy judicial time without disposing of the backlog. One result of this situation has been a greater reliance than had been intended on the concurrent jurisdiction of courts of summary jurisdiction. This has added confusion and complexity to the administration of the law of custody by providing an alternative forum to the Family Court. A forum, moreover, which is not supported with court counselling or able to provide the specialist services in family law that the Family Court can provide. These matters are discussed in greater detail in chapter 8 of this Report.

4.4 Some of these problems could be overcome if the steps we propose in chapter 7 were taken. The court needs to be provided with additional support: deputy registrars to undertake pre-trial procedures and court counsellors to intervene early in disputes involving children. It is not sufficiently realised by the public, disquieted as it is by the difficulties that delays and backlogs have caused, that larger registries of the Family Court have never been in a position to function in accordance with the original intention of the Family Law Act. In Western Australia where the State Family Court has been provided in accordance with the original intention, these problems have not been experienced to anything like the same extent.

4.5 In the meantime there must be considerable concern about the delays that are occurring. Modern research in the field of child development suggests that, in the interest of children involved in the separation of their parents, the question of who is responsible for their care should be determined as quickly and as finally as possible. The authors of an influential book[4] have noted the importance of secure placement of a child. Child placement decisions must take into account the law's incapacity to supervise interpersonal relationships and the limits of knowledge to make long term predictions. They reach the conclusion that the law should facilitate the rapid and final determination of custody disputes. The conclusions of these authors are discussed later in this chapter.

4.6 An important consideration is the extent to which separating parents should be encouraged to reach their own arrangements concerning custody and access. The policy of the Family Law Act seems to encourage this by providing that both parties to a marriage are the joint guardians and custodians of their infant children. A recent line of thought to which the Committee's attention has been directed emphasises the importance of private ordering.[5] These ideas have been developed by Professor Robert H. Mnookin and Lewis Kornhauser of the University of Berkeley, California.[6]

> Available evidence concerning how divorce proceedings actually work suggests that a re-examination from the perspective of private ordering is timely. Typically, the parties do not go to court at all, until they have worked matters out and are ready for the rubber stamp. Both in the United States and in England, the overwhelming majority of divorcing couples resolve distributional questions concerning marital property, alimony, child support and custody without bringing any contested issues to court for adjudication.
>
> This new perspective and the use of the term 'private ordering' are not meant to suggest an absence of important social interests in how the process works or in the fairness of its

outcomes. The implicit policy questions are ones of emphasis and degree: to what extent should the law permit and encourage divorcing couples to work out their own arrangements? Within what limits should parties be empowered to make their own law by private agreement? What procedural or substantive safeguards are necessary to protect various social interests?

Nor is this perspective meant to imply that law and the legal system are unimportant. To divorcing spouses and their children, family law is inescapably relevant. The legal system affects *when* a divorce may occur, *how* a divorce must be procured and *what* the consequences of divorce will be. Our primary purpose is to develop a framework within which to consider how the rules and procedures used in court for adjudicating disputes affect the bargaining process that occurs between divorcing couples *outside* the courtroom.[7]

An objective of the law should be, therefore, to foster private ordering. It is the view of the Committee that the way this can be done is by ensuring that legislation discourages parties as far as possible from litigating their disputes by reducing the discretion available to courts.

> existing legal standards governing custody, alimony, child support and marital property are all striking for their lack of precision and thus provide a bargaining backdrop clouded by uncertainty. The almost universal judicial standard for resolving custody disputes is 'the best interests of the child' test. Except in situations where one parent poses some substantial threat to the child's well being, predicting who will get custody under this standard is difficult indeed especially given the increasing pressure to reject any presumption in favour of maternal custody.[8]

4.7 It is considered that the unpleasantness associated with disputes over children can best be reduced by creating an environment that will facilitate negotiations between parents. In directing resources, therefore, the aim should be to discourage litigation and foster private ordering. These are ideas that need to be considered when analysing the operation of the Family Law Act, as it at present operates. There are many other problems that confront the operation of the Family Law Act, not least of which is the operation of the federal system. As already indicated many of these problems could be overcome given co-operation between the levels of government in Australia.

Children's Welfare: Duty of Court in Dissolution Proceedings

4.8 Section 63(1) of the Family Law Act provides that in proceedings for dissolution of a marriage, a *decree nisi* for dissolution will not become absolute in a case where there are 'children of the marriage' under the age of 18, unless the court has declared that it is satisfied:

- either that proper arrangements in all the circumstances have been made for the welfare of those children;
- or that there are circumstances why this requirement should be dispensed with.

Similar provisions applied under the repealed *Matrimonial Causes Act* 1959.[9]

4.9 The Matrimonial Causes Act was open to criticism on the grounds first, that the court usually had to rely on the parties' account of the proposed arrangements for the children and had no opportunity to check such arrangements for itself, and secondly, that there was no procedure for ensuring that the proposed arrangements were carried out.[10] However, the Family Law Act seeks to overcome both these shortcomings: first, subsection (2) of s.63 provides that if in dissolution proceedings the court is in any doubt about the adequacy of the arrangements for the children it may adjourn the proceedings until a report has been obtained from a welfare officer or court counsellor concerning those arrangements; secondly, s.64(5) gives the court power to order that any order made under Part VII of the Act (and that includes an order under s.63 (1)),

be supervised by a welfare officer. It should also be noted that the class of children to whose welfare the court can direct its attention under s.63 (1) includes not only the natural and adopted children of the parties but also a child of only one of the parties if that child was a member of the parties' household. This is a wider class of children than the class in respect of which custody and maintenance proceedings may be dealt with under the Act since the *Russell* decision.[11]

4.10 A similar procedure applies to dissolution of marriage procedures in the United Kingdom. In a recent study,[12] an examination was made of representative samples of orders made with respect to children in England, Wales and Scotland. A major finding of the study was that orders made by the courts often, after quite comprehensive follow-up and welfare reports, varied the original arrangements reached by the parties to an insignificant extent. This was done in only 4 of 607 uncontested cases in England and Wales (0.6%) and in one case in Scotland. The study concluded that it was not clear what the courts achieved in practice by attempting to exercise the supervisory function.

> A 'satisfaction' report by a welfare officer, when sought may indeed more fully inform the judge of the situation, but it is very unlikely to lead him to make an order which alters the existing situation. One obvious reason for this is the limited range of alternatives open to a judge. Even assuming the conditions in which the child is living are not very satisfactory, it would seldom be practicable or even sensible to transfer the child to the other parent (who may not want the child). If the proper solution lies in committing the child to the care of a local welfare authority, it is arguable that the jurisdiction to do this already exists under the child welfare law and that it is by no means clear that it is appropriate to move a child from his home environment under the divorce jurisdiction in circumstances where the requirements for such removal under welfare law are not right.

4.11 Provisions such as section 63 (1) are justified on the ground that the court is thereby enabled to review the private agreements parents have reached and thereby improve the quality of negotiation between the parties. The possibility of review will serve to remind parents of the social concern for their children and might constrain selfish behaviour. Thus in cases involving children, the judge's role as 'audience' is important. Professor Mnookin in his discussion of private ordering, however, makes the following points:

> The evidence we have suggests that in operation courts rarely overturn parental agreements. Given the resources devoted to the task of scrutinising agreements, there is little reason to believe that the process operates as much of a safeguard when there is no parental dispute to catch the judge's attention. Moreover, the process itself often imposes substantial transaction costs—both public (in terms of government resources expended) and private (in terms of the cost to the parties, the legal fees, and time). These extra transaction costs might otherwise inure, at least in part, to the benefit of the children.
>
> There are also reasons to think that, in the vast majority of cases, judicial review is unnecessary. The custodial spouse will typically perceive and attempt to influence the economic consequences for the child of any support arrangement that he or she agrees to, since there is considerable joint consumption between the custodial parent and the child. Moreover, most parents care deeply for their children.
>
> No court proceeding can require parents to love their children, and no judge can prevent selfish calculation by a divorcing parent. The implicit attitude during the heyday of the fault-based system was that there are good reasons not to trust parents with child-rearing decisions following divorce. But is this attitude really appropriate today?

In view of the resources involved in procedures under section 63 (1) it is considered that it should not merely be assumed that they serve a valuable purpose.

Recommendation 7

4.12 *It is recommended that the Institute of Family Studies should undertake research with a view both to assess the value of the procedures under s.63 (1) of the Family Law Act, relating to the approval by the court of arrangements reached by the parties to a marriage regarding the welfare of children of the marriage and to examine alternative methods of supervising placement arrangements by couples upon separation. The study should make recommendations as to the extent of involvement of Commonwealth and State welfare departments, voluntary agencies and the court counselling services.*

Custody and Guardianship

4.13 Section 61 (1) of the Family Law Act provides:

> Subject to any order of a court for the time being in force, each of the parties to a marriage is a guardian of any child of the marriage who has not attained the age of 18 years and those parties have the joint custody of the child.

Section 64 (4) of the Act clearly envisages the use where appropriate, of a joint custody arrangement by the court, either by means of specific order to this effect or simply by the court's declining to make an order for sole custody in favour of one parent. The provisions of the Family Law Act enable separating parents to reach arrangements between themselves which the court can approve under s.63 (1). The existence of the provision also means that the court has greater flexibility when making orders.

4.14 There was a substantial departure under s.61 (1) of the Family Law Act from the position at common law and under the *Matrimonial Causes Act* 1959. The meaning of various terms that could have been used with regard to rights and responsibilities in relation to children was by no means clear before the Family Law Act. There still appears to be some confusion about the terms guardianship and custody used in section 61 (1). Guardianship, in the fullest sense, has been said:

> to include the power to control education, the choice of religion and the administration of the infant's property. It includes the right to veto the issue of a passport and withhold consent to marriage. It includes also both the personal power physically to control the infant until the years of discretion and the right . . . to apply to the courts to exercise the powers of the crown as *parens patriae*.[13]

In relation to custody it has been noted that:

> The 'right of custody' protected by the common law was the right to physical possession . . . The right was often expressed as the right to 'custody and care and control'. The confusion between custody and guardianship began when courts began to treat care and control as separable from custody.[14]

In both Australia and the United Kingdom, courts sometimes adopted the practice of granting custody to one parent and care and control to the other, thus further confusing the distinction.

> The Courts do not usually spell out precisely what they mean by custody when they pronounce orders for custody, simply because custody is generally used to embrace both of these concepts, although on occasions an order is made vesting the legal custody of a child in one parent and the care and control in the other.[15]

This device was sometimes used where a matrimonially innocent husband was granted custody with care and control to the guilty wife where the child was of tender years.

4.15 The use of the terms custody and guardianship in section 61 (1) invites the conclusion that there is a difference between them. It is noted that under the New Zealand *Guardianship Act* 1968 (s.3) 'custody' is defined as meaning the right to possession and care of the child and 'guardianship' as meaning the custody of a child and the right to control over the upbringing of a child.

4.16 It would seem that a need exists for precise meaning to be attached to terms such as guardianship, custody, care and control as these assume considerable importance where the rights of a child and adults in relation to that child are enunciated by courts. Nor is it sufficient that the Family Law Act alone should define the terms clearly, as various expressions are to be found in legislation of the States and the Commonwealth applying to children in areas such as adoption. Definition ought not therefore be attempted until agreement is reached by the Attorneys-General of the Commonwealth and States as to how these terms should be employed so that some uniformity in respect of legislation on children can result.

Recommendation 8

4.17 *The Committee recommends that the Family Law Act and other legislation of the Commonwealth and the States should be examined by the appropriate authorities to ensure a consistent use of terms such as guardianship, care and control and custody. Where necessary, terms should be defined so that the nature of the relationship between a child and the person standing in a relationship towards the child are precisely expressed. The Commonwealth Attorney-General and the Minister for Social Security should take this matter up with their State counterparts with a view to achieving a uniform approach to the use of these terms. This Committee is of the view that the terms 'guardianship' and 'custody' and 'care and control' should be defined with some care in the Family Law Act itself, and, more particularly, that the terms 'guardianship' and 'care and control' should be carried through into other provisions of Part VII of the Act which are relevant e.g. s.61(4), s.64 sub-sections (2), (3), (4), (9), s.67(1), s.68, s.69, s.70*

Wardship

4.18 The jurisdiction to make a child a ward is an ancient one. It would appear that where a child is made a ward:

> . . . the court retains the custody of the infant and only makes such orders in relation to that custody as may amount to a delegation of certain points of its duties.[16]

The Family Law Act does not make provision for the court to make a child a ward.[17] This matter was adverted to in the most recent report of the Family Law Council.[18] The Council is soliciting views as to whether the Family Law Act should be amended to enable the court to exercise wardship powers. As the Family Court acquires jurisdiction in relation to children, displacing the State courts in this regard, there is a danger that in some situations no court would have the power to exercise a wardship jurisdiction, unless the power is conferred on the Family Court. If the Family Court were in a position to exercise jurisdiction in wardship matters, it may provide the court with an additional means of supervising some aspect of its orders.

Recommendation 9

4.19 *The Committee recommends that the Family Law Act be amended to insert into section 61 of the Act, a provision that would empower the Family Court to exercise the prerogative of declaring children within its jurisdiction to be wards of court.*

4.20 The situation may well arise where the court concludes that the best interests of the child would be served by it being placed in care. Alternatively, welfare authorities of the States may consider it desirable in the interest of the child to intervene in a custody case. Where it considers both parents to be unsuited there appears to be no power in the court under the legislation for the court to make an order that the child be placed in care. It cannot formally invite the officer responsible for administering child welfare laws in the State or Territory to appear. Under section 91 the court has power to request the Attorney-General to intervene. Similar provisions could be inserted in relation to State welfare department officials. This does not guarantee that the responsible officer would respond to the invitation. Even if he were to respond it would not follow that he would agree to place the child in care. Assuming that the court would only have resort to such a provision in appropriate circumstances, there would not seem to be any objection to the provision of such power.

Recommendation 10

4.21 *The Committee recommends that the Family Law Act be amended to provide that the court may request a designated official (i.e. an officer responsible for administering welfare laws in the State or Territory) to intervene in proceedings before the court where the court considers it appropriate so to request in relation to a child of a marriage whose welfare is under consideration in proceedings before the court.*

Separate Representation

4.22 Provision is made in section 65 for the separate representation of children involved in proceedings in the Family Court. The court may make an order for separate representation either of its own motion or on the application of the child or a person or agency on the child's behalf. It is usual for representation in such circumstances to be undertaken by the Australian Legal Aid Office.

4.23 The following explanation of the background to s.65 was given by Mr Justice Asche [19]:

> Section 65 is not entirely new. In 1967 the Rules under the Matrimonial Causes Act were amended by the addition of Rule 115A. This provided for separate representation of a child by a guardian *ad litem* appointed for that purpose. So far as I know this Rule was rarely, if ever, used and this for a very simple reason, namely, that if such a guardian were appointed it would have been necessary for one of the parties to have borne the costs. Since that party would usually have been the husband, and since the general rule prevailing was that he paid his wife's costs in any event, one can understand that both he and the Court were somewhat less than enthusiastic to place an additional burden on his shoulders.
>
> This obstacle has been faced and surmounted by the provision of reg. 112(2) of the Family Law Regulations. This allows the Court to request that representation of the children be arranged by the Australian Legal Aid Office. The result has been a significant number of orders made by the Family Court under s.65 and I am emboldened to say that it is right that this should be so.
>
> For the provisions of s.65 seem to me to add a new and effective and, dare I say, exciting concept to the idea of a Court seeking to regard the welfare of the child as the paramount consideration. It allows for the interposition of a third impartial person or mediator between the two warring parties and must inevitably lead to or force upon the parties a reconsideration of aspects of a child's welfare to which the immediate personal dispute may have temporarily blinded them.

4.24 A substantial number of the submissions that the Committee has received on the matter of children, are concerned with this matter of the separate representation of the child. The main concerns of the submissions on this matter are:

- that there is not sufficient use made of the provision for separate representation of the child;
- that separate representation of the child ought to be mandatory in every contested custody case; and
- that the duties of the child's representative should be more clearly defined.

4.25 The Committee was told by Mrs Charlesworth, a senior lecturer in Social Work at the University of Melbourne, who has made a special study of the relationship between members of the legal and social work professions, that one reason the judges had given her for the lack of frequent use of the separate representation provision is 'that it takes too long and because A.L.A.O. runs out of money about the 18th of every month.' She also stated that judges have remarked to her that very often separate representation 'is a catalyst which makes a very much better solution than they are usually able to reach because they have somebody out there really investigating the possibilities of what could happen with the children.'

On the question of the type of case in which a child ought to be represented, the following passage from the submission to the Committee by the Director of Counselling for the Family Court of Western Australia ought to be noted:

> Whilst (s.65) is commended as providing for protection of the legal interests of children, doubt still exists as to the types of situations where this provision can be most effectively utilised. There has been a tendency for separate representatives to be involved largely with the issue of children's wishes as to custody and access, a situation often regarded as not warranting legal representation due to the main means available to the Court for ascertaining the wishes of children, the report by the court counsellor or welfare officer. Ordering a report and separate representation when the wishes of a child are the main issue usually duplicates the process and exposes the child to more interviews than are necessary.
>
> The real value of separate representation in custody or access proceedings occurs when witnesses have information which they believe to be vital to the Court proceedings, but who did not wish to appear as a witness for either of the parents. Such people include welfare workers in various agencies or institutions who have had direct involvement with the family and feel that the welfare or protection of the child would be well served by the Court being aware of their experience. In such cases Section 65 provides adequately for separate representation to be applied for and ordered so that the child's solicitor can then bring the evidence to the Court without the witnesses having to be called by either parent.
>
> Section 65 is seen to be most effective when the child's welfare and protection can be served by bringing separate evidence but it is seen as a less effective means of communicating the wishes and preferences of children to the Court than the court counsellors' report.

4.26 With regard to the suggested need for a better definition of the functions of the child's representative, the reported cases would seem to indicate that the exact role and nature of the functions of the child's representative have indeed caused difficulty for the legal profession and some controversy among the judges of the Family Court. Early in the life of the Act it was held that the position of the child's legal representative is analagous to that of the Official Solicitor in wardship cases in England. The Official Solicitor is not only the child's solicitor, but also an officer of the court. In this latter capacity he makes a report to the court; he need not accept the child's views and he is entitled to interview all parties in the course of his investigation. However, in subsequent cases it has been held that counsel for a child

was in no different position to counsel for any other party.[20] The Full Court of the Family Court, in the case of *Lyons* v. *Boseley* have suggested guidelines concerning the role of the child's representative.[21]

4.27 As mentioned earlier, an objective of the Family Law Act is to ensure, as far as possible, that disputes concerning children be resolved by conciliation rather than adversary proceedings in court. The power of the court to appoint an advocate to represent the interests of a child or children involved in proceedings is relevant to adversary proceedings. The appointment is made in the course of proceedings by the judge. Practitioners in the Family Court area have noted some difficulties which arise in practice. The appointment of the advocate usually occurs in the course of proceedings with the result that the proceedings have to be adjourned with resulting delays and additional costs to all parties involved in the case. The advocate appointed to represent the child may consider it necessary to call additional witnesses or have the child examined by experts, to counter expert testimony. In the context of contested cases, the power to appoint an advocate to represent the child is a valuable power for the court to have. However, there is a tendency to attach more significance to this power than it warrants. It would not be sensible for the court to appoint a separate advocate in every contested case as some submissions have suggested. This would involve a very large financial commitment and might be perceived as underwriting the adversary approach to the settlement of disputes. If, as is recommended in this Report, the available resources are directed towards the conciliation elements of the court's work in the areas of pre-trial and counselling, then more cases would be settled before they had progressed to the point of acrimony where a separate advocate to represent the child was needed. The Committee does not consider it necessary to make recommendations concerning the separate representation of the child.

The Powers and Duties of the Court in Custody Proceedings

4.28 Apart from the powers and duties of the court under section 63 and section 65, which were discussed in the previous sections, the main provisions of the legislation are contained in section 64 which sets out the powers of the court in deciding custody, guardianship and access proceedings. In such proceedings the court is empowered to make such orders as it thinks proper (s.64 (1) (c)) subject to the following two restrictions:

- the welfare of the child must be the paramount consideration (s.64 (1) (a));
- if the child has reached 14 no order may be made contrary to its wishes unless the court is satisfied that special circumstances exist which make it necessary to do so (s.64 (2) (b)).

Children's Wishes

4.29 The law determines that in the case of a child aged 14 and above it is the child's wishes and not the court's concept of what the welfare of the child requires, which is the determinative factor in the first instance. To overcome this, the court must find 'special circumstances' which will require more than a finding that in the court's opinion one parent is a better custodian than the other. It must be shown that the parent whom the child has chosen is positively unfit or incapable of exercising custody over the child or that the child's will has been overborne.[22] As regards children under the age of 14, the court must determine for itself what the welfare of the child requires, having regard to the child's own wishes if it considers that the child

is capable of forming a reasonable and independent view on the matter. The Senate Standing Committee on Constitutional and Legal Affairs, in their Final Report on the Family Law Bill 1974, recommended that the clause relating to a specific age be omitted as it was 'too rigid and restrictive on the court' and that the provisions relating to the welfare of the child as the paramount consideration were 'adequate for the purpose of taking proper account of a child's wishes in custody proceedings'.

4.30 Of the submissions received, those dealing with the wishes of children have advanced the following alternatives to the present provisions in s.64 (1) and s.64 (8):

- age should be lowered; (23)
- age should be increased; (24)
- specific age provision be deleted; (25) and
- court should not be bound by children's wishes alone (26)

In a submission to the Inquiry dealing exclusively with section 64 (1) (b) of the Act Elizabeth de Lacy, a developmental psychologist, using theories of Piaget, Erikson and Kohlberg submitted that:

- all children, regardless of age, be offered the opportunity to express their wishes in relation to the question of custody;
- the court retains its powers of discretion in relation to the wishes of any age children, including those who have attained 14 years because of the egocentricity of children of this age, and in spite of their mature cognitive development;
- the court retain its discretionary powers in relation to the wishes of children of 14 years, because their moral judgments have not usually reached the level considered acceptable for adult decision making; and
- the court shares the responsibility for decisions about disputed custody with children of 14 years because of the complex nature of attachment bonding and its relation to the child's welfare.

In relation to this latter point Elizabeth de Lacy stated:

> An important feature of developing attachment is the intensity of the interaction between the caregiver and the child. This behaviour is usually conceived of as laughing and playing with the child, and is associated with increasing the intensity of positive interaction; but unfortunately increasing the level of negative interaction with the child also serves to facilitate the attachment bond. The consequences can be that the child will become attached to the parent who punishes, abuses, frightens, shames or forcefully rejects the child.

4.31 Another submission by the Western Australian Marriage Guidance Council argues that because of the long-term effects of feelings of guilt and anguish experienced by children who have at an early age been forced to choose between their parents, no child should bear full responsibility for this kind of decision. The Family Court of Australia also endorses this view and states that the court should have regard to the wishes of children, attaching to them such weight as is appropriate having regard to the age and maturity of the child. Witnesses representing the Mental Health Branch of the Capital Territory Health Commission recommends that children aged 12 and above should have the right to be heard but that children under 16 should not have the power to decide on future placement. Several other submissions favour a better consultative process whereby a child's welfare may be more effectively assessed. The Family Law Advisory Committee of the Law Council of Australia submitted that there should be retention of some reference to the need of the court to undertake some consultation with the child, while representatives of the Special Services Branch of the Attorney-General's Department favour the whole family conference approach to consultation where the dynamics of family roles and relationships can be more fully explored and better understood.

4.32 Professor David Hambly, Professor of Law, Australian National University, suggests that the section be repealed and substituted by a paragraph which endorses the common law on the weight to be given to the wishes of the child. This would have the effect of allowing the court to consider each case on its individual merit and to uphold the paramountcy of the welfare of the child, without pressuring the child to make a decision against his will. In its Second Annual Report, the Family Law Council, in considering its position on the issue, also favoured the common law situation where the court would consider the age and maturity of the child and other relevant factors such as the wishes of siblings. The Family Law Council in arriving at this conclusion gave consideration to a working paper by Mr N. Buckley[27] which was the result of a consultation process to elicit the views of community and professional organisations and interested individuals. Mr Buckley in his final recommendation urged the repeal of s.64 (1) (b) and s.64 (8) and, on the basis of similar legislation in the United States, the insertion of a set of provisions which would have the effect of codifying all of the factors to be taken into account in the determination of custody.[28]

4.33 It is the Committee's conclusion that the wishes of children where relevant should be taken into account in all cases as one of the factors that the court should consider. In paragraph 4.49 of the Report the Committee makes recommendations as to how section 64 (1) should be amended. At this stage it merely agrees with the overwhelming weight of the evidence submitted that, as currently drafted, the section places undue emphasis on the wishes of 14 year old children. It is important that the machinery by which the views of children are taken into account by the court should be appropriate. It is not considered satisfactory for judges to interview children privately or for children to be called upon to testify in adversary proceedings between the parents. The Court Counselling Service should be available, as it is now, to explain to the children what rights they have and to make reports on the issue of their wishes to the court.

Recommendation 11

4.34 *The Committee recommends that in relation to the extent that the wishes of a child should be taken into account in custody proceedings that the specific reference to the age of 14 should be removed from the legislation and not replaced by any reference to a specific age.*

The Welfare of the Child

4.35 The criterion by which disputes concerning custody, guardianship and access under the Family Law Act are determined is that the welfare of the child must be the paramount consideration. This is sometimes referred to as the 'welfare principle'. In the past, courts have given weight to various criteria which precedent has established as pointers on the way the courts will determine what is the welfare of the child. Under the previous legislation the matrimonial conduct of the parties was given considerable weight. Under the Family Law Act conduct or behaviour has been held to be relevant to the question of custody only to the extent it affects the suitability of the disputing parties as parents or custodians. An examination of decided cases reveals that it is very difficult to predict the outcome of custody cases where there are allegations concerning the moral suitability of one contending parent over the other. Cases that appear to have caused courts the greatest difficulty have involved situations where one or both of the applicants is living in an unconventional relationship. The Committee considers the issue to be the risk to the child, whether the arrangement is conventional or unconventional.

4.36 Some of the cases have concerned sexual preference. Others have concerned more general questions of upbringing where one or other of the parties has gone to live, say, in a religious community and proposes to raise the child according to its beliefs. These are very difficult cases for courts to determine and must always involve elements of subjective judgment. The range of factors that will influence the outcome of any particular case are infinitely variable. Decided cases where factors such as sexual orientation or religious beliefs have been an issue can provide only uncertain guidance to courts in other cases.

4.37 Changing attitudes towards child development have also influenced the outcome of custody cases. For many years it was considered that the courts would have a bias in favour of placing very young children in the care of the mother. This was known as the 'preferred role of the mother'. Many people in their private submissions to the Committee have alleged that there is a bias against fathers or a preference in favour of mothers, in the present system of custody awards. However, despite the submissions alleging a 'mother' bias in the Family Court, the reported cases clearly indicate a retreat from the presumption in favour of the mother since the passage of the Family Law Act.

4.38 Some early decisions of the Family Court indicated that some judges still cherished the bias in favour of placing young children in the care of their mother. But more recent cases have established that:

> The suggested 'preferred' role of the mother is not a principle, a presumption, a preference or even a norm. It is a factor to be taken into account where relevant.[29]

It is generally considered that the courts will be loath to separate children by distributing the children in families between the parents.

> The case in which the welfare of the children requires that a family be divided must be very rare. Division usually arises because, as between themselves, the parents seek to satisfy each other's proprietary interest in their children, but any proprietary interest in children is something the Court is forbidden to consider. There may be special circumstances for example, where children detest each other or are of mixed race . . . or are widely separated by age, or the means of neither parent alone permit him or her taking care of all the children, where such division may be in their interests.[30]

One can understand why courts will be reluctant to take on themselves the responsibilities of dividing families up. But it is noted this frequently happens where the parties to the former marriage reach their own arrangements.

4.39 However, a factor that clearly influences the courts and is significant in its effect on the behaviour of parties to custody disputes is the importance attached by the courts to maintaining a secure environment for children and a reluctance to interfere in the status quo, as regards the child's existing placement, unless evidence against the spouse with custody can be adduced.[31]

Unfortunately, the knowledge that courts are influenced by these considerations has been exploited by some parties and their advisers. The importance of obtaining *de facto* custody of the child and deferring proceedings for as long as possible, so as to extend the period in which the child is in the custody of a parent, is recognised as a means of improving the chances of that parent in succeeding in the case when the matter is eventually litigated.

4.40 The importance of a flexible approach by the courts to this matter of the status quo, at a time in which there are delays in custody hearings is well highlighted in the following passage from a paper entitled *Custody of Children under the Family Law Act*

given by Ellen Goodman a lecturer in Family Law at a seminar at Macquarie University, March 1979:

> If too heavy reliance is placed on the undesirability of upsetting the status quo, the parent who has *de facto* control of the child while awaiting the hearing has an unfair advantage. While it is conceded that the court must take into consideration the possible trauma to a child, of a change of his/her environment, the current delays in hearing contested custody disputes perpetuate a situation which may well be seen as grossly unfair to the parent seeking custody who does not have the care and control of the children.

This has led to a practice of parties applying for interim custody orders so as to obtain an early advantage in relation to a dispute. The significance of interim orders and the reluctance of courts to overturn them is that those orders provide some proof of the unfairness of the delays. Because of the delays it is tactically advantageous for a party to apply for an interim order which will be dealt with much sooner than the custody order proper. By taking up time of the court on interim orders even longer delays in the hearing of custody orders proper result.

Access

4.41 Closely related to the disposition of custody is the question of access. Section 64 of the Act which defines the powers of the court in custody, guardianship and access proceedings, empowers the court to make 'access' orders in two different situations and senses. The first situation in which an access order can be made is where a party who has not been granted custody of a child is given the right to see the child at certain times under certain conditions. This is 'access' in the traditional sense and it is provided for in sub-section (3) of s.64. Sub-section (3) empowers the court to include in an order placing a child in the custody of the parent or of a third party, 'such provision as it thinks proper for access to the child by any person'. However, the Act envisages a second situation in which a so-called 'access' order may be made and that is where parties have joint custody of a child and it is necessary to define the degree of physical control which each party will have over the child. This situation is provided for in sub-section (4) of s.64. Sub-section (4) states that:

> Where a court makes an order for joint custody of a child . . . or declines to make an order for the sole custody of the child, it may make orders as to access or such other orders as it thinks proper.

Also relevant to the question of access is sub-section (5) of s.64. This sub-section provides that the court may order that any order under Part VII of the Act (ie. including an access order) shall be supervised by a court counsellor or welfare officer if the court considers that the welfare of the child so requires.

4.42 Access disputes are among the most troublesome matters with which the court has to contend. Frequently the outcome of a contested custody case will be an order that one parent will have custody with precisely defined terms of access to the other party. The relationships between the parties who have disputed the question of who should have custody of the child is frequently so bad as to make access at best, very difficult, and at worst, almost unworkable. It is often the child who will suffer most. Recent studies undertaken in the Brisbane registry of the Family Court[32] reveals that access arrangements work best where the parties have negotiated the question of custody between themselves and work worst where the court has imposed an order on the parties. Where the arrangements have been freely negotiated the access arrangements tend to be flexible. The parents will arrange access to suit themselves and suit the interests of the child, that is to say, parental rights are not permitted to override the child's own private agenda of interests. Where access is pursuant to a court order the arrangement is necessarily rigid. Bad communication between the parties often results in the arrangement conflicting with one or other of their own interests or with the interest of the child. The child will be required to accept his visitation rights even when it conflicts with his own cultural, sporting or social needs. The studies at the Brisbane registry also showed that there was a marked tendency for access arrangements to change over the years following separation and a general trend for access to decrease over time. Access decreases over time more often in cases of rigid arrangements than flexible arrangements. Access and thereby continuation of a child's contact with its custodial parent, was fostered by freely negotiated flexible access arrangements.

4.43 The conclusion of this research was that the earliest possible intervention of court counsellors was the best assurance that the separating parties would reach sensible, flexible arrangements regarding care and control of their children. This research and other evidence available to the Committee points to the need to develop the counselling and conciliation areas of the court's work in relation to questions of custody. The evidence clearly suggests that once matters between the parties deteriorate to the point where contested proceedings become inevitable the children will suffer as a result of the bad relations between the parties.

4.44 Even with the most favourable provision for counselling services there will still be cases where custody will be contested. The approach adopted by the courts continues to be that children have a right to continuation of relationships with both parents after divorce. Access is seen as the right of the child rather than the right of the parent to have access to the child. The opposite approach to this is that suggested by the authors of *Beyond the Best Interests of the Child*, who stated:

> . . . certain conditions such as visitation may themselves be a source of discontinuity. Children have difficulty in relating positively to, profitting from and maintaining the contact with two psychological parents who are not in positive contact with each other. Loyalty conflicts are common and normal under such conditions and may have devastating consequences by destroying the child's positive relationship with both parents. A 'visiting' or 'visited' parent has little chance to serve as a true object for love and identification since this role is based on his being available on an uninterrupted day-to-day basis.
>
> Once it is determined who will be the custodial parent, it is that parent, not the court, who must decide under what conditions he/she wishes to raise the child. Thus the non-custodial parent should have no legally enforceable right to visit the child, and the custodial parent should have the right to decide whether it is desirable for the child to have such visits.[33]

Such a solution might have the effect of reducing the number of contested custody cases but the consequences for a child would be the loss of the possibility of access to one of its parents. This seems a harsh consequence. While this is likely to remain a difficult area for the administration of the law it is considered that the problems will be partly ameliorated if:

- counselling and conciliation services are provided to facilitate early interventions;
- solicitors encourage parties to negotiate and to make use of the services of counsellors both in relation to disputes over custody and over access;
- parties are directed to services provided either by the court or within the community that might help them to resolve their own problems and to learn how to relate to the children in the post-divorce situation. There are many community resources available to assist people in this situation such as self-help groups which are run by voluntary agencies, funded under the Act, and by organisations such as Parents without Partners;

- courts, counsellors and the legal representatives of the parties co-operate to ensure that orders made regarding access are expressed in a flexible way so that the parties are encouraged to seek assistance when they are having problems and to re-negotiate their arrangement;
- court counsellors have the opportunity to refer matters back to the court where arrangements are not working. Counsellors dislike being placed in an enforcement role which some see as arising when they are directed to supervise orders under s.64 (5). It is considered that this situation would not arise if the counsellors and the court co-operate so that orders are sufficiently flexible to ensure that the counsellors are not merely required to enforce the order of the court but can help the parties to negotiate problems.

Custody Guidelines

4.45 In regard to the determination of custody and access questions, a number of observations need to be made. There are a number of disturbing features in the present situation In the first place the Committee is concerned about the delays that are occurring. Secondly, it is disturbed by the uncertainty of the outcome of disputed cases which appears to be almost an invitation to parties to litigate. Finally it is concerned about the lack of finality where orders are made concerning a child's future custody and welfare. In regard to the question of finality it should be pointed out that an order made by a judge is first subject to appeal to the Full Court of the Family Court. It is then possible, where jurisdictional issues are involved, for a matter to be taken on appeal to the High Court of Australia. It is possible that placement arrangements for the child can be changed as a result of different orders of these courts. A recent High Court decision is a good illustration of what can happen. The case[34] concerned a 4 year old child. When the parties separated, the girl went to live with her father. There she remained, throughout three hearings before the Family Court in the last two of which the mother was unsuccessful in seeking custody. There then followed a successful appeal by the mother to the Full Court of the Family Court, whereupon she was placed with her mother. The High Court of Australia upheld an appeal by the father. In his judgment Mr Justice Stephen observed:

> While I would allow this appeal I am concerned that this will involve a change in the custody of [the child], who has for the past seven months been in the custody of her mother, pursuant to the order of the Full Court. My concern arises because . . . neither the Full Court nor this Court knows anything of the events either of those seven months or, for that matter, of the six months which preceded them and which commenced with the conclusions of the hearing before Evatt C. J., in June 1978.

4.46 His honour then referred to rules applying to the disposition of custody cases in the United Kingdom:

> If any significant change in circumstances have occurred since June 1978 they can, no doubt be investigated on an application for a variation of the order of Evatt C. J., but in the meantime the custody of [the child] will have reverted to her father, with the possibility of yet another change of custody were such an application for variation to succeed.

His honour was of the view that the operation of the order allowing the appeal should be stayed pending further application by the mother for variation of the original order. However, the majority of the court simply allowed the application and restored the order of Chief Justice Evatt.

4.47 It is very difficult to see how, in the kind of circumstances which the events of this case illustrate, the criteria of the best interest of the child can be said, truly, to be operating in the interest of the child. Certainly, the courts are required to apply that

standard but in circumstances where the dispute is between parents as to their own rights in respect of the child, the dominant consideration in such cases is that it is the dispute between the parents that must be settled by the court. This case and the many like it raise for serious consideration the question of the most appropriate disposition of custody cases. The Committee is convinced that it is necessary to provide safeguards in the legislation that will limit the scope of parties and their advisers to conduct endless litigation over the rights in respect of young children, and accordingly recommends.

Recommendation 12

4.48 *In order to reduce as far as possible the unnecessary bitter and prolonged custody and access proceedings, a new s.70A should be inserted in the Act providing that in proceedings with respect to the custody and guardianship of a child of a marriage, the court shall, as far as practicable make such orders as will avoid further proceedings* The Committee does not believe it can go beyond this provision, nor be more specific than this if only for the reason that, in the case of access, it will always need changing much more than custody, and once a custody order is made proceedings can be brought, under recent authorities, by persons other than the parties to the marriage.

4.49 Criticism is sometimes levelled at the subjectivity of judges who are accused of allowing personal prejudices to determine their decisions. It has even been said than it is the list clerks of the courts who determine the outcome of custody cases. The presence of such uncertainty and the opportunities for appeal that this gives rise to under the present Act is considered one of the reasons for the proliferation of applications for custody. If the outcome of custody cases was more readily predictable by the parties their legal advisers and by court counsellors, an inducement to settlement of disputes by negotiations between the parties would be provided. The determination of standards that could be applied is not an easy matter. The drafting of a suitable provision would obviously require considerable research. The Committee can only indicate some guidelines in this report.

Recommendation 13–The Committee recommends that:

Section 64 (1) should be drafted to state the following criteria to be taken into account by the court:

(a) *The Court shall regard the welfare of the child as the paramount consideration;*

(b) *The Court shall take the following matters into account:*

(i) *the relevant conduct, as parents, of the parents of the child;*
(ii) *the relevant conduct of any step-parents or persons sharing the care, control and guardianship of the child with the custodian;*
(iii) *the wishes of the child's parent or parents as to his custody;*
(iv) *the wishes of the child;*
(v) *the desirability of, and the effect of, any change in the present care and control of the child;*
(vi) *if there is more than one child under consideration, the effect of the separation on the children;*
(viii) *the education and up-bringing of the child;*
(viii) *any other fact or circumstance which, in the opinion of the Court, the justice of the case requires to be taken into account.*

(c) *Subject to paragraphs (a) and (b), the Court may make such order in respect of those matters as it thinks proper, including an order until further order.*

Recommendation 14

4.50 *The Committee recommends that no case should be listed for determination of custody by a judge until the parties had attempted to resolve the disputes in pre-trial conferences with court counsellors and registrars.*

The Committee was told that this was the situation in the Western Australian Family Court and that its implementation had greatly reduced the number of contested cases. It follows that courts should be provided with adequate resources to enable such pre-trial conferences to be heard within weeks of an application for custody being filed.

It is recognised that such a solution is not possible given the present level of resources available to the court. It is the view of the Committee, however, that this is an urgent priority and that every effort should be made to provide the Family Court with the necessary resources with the least possible delay.

Recommendation 15

4.51 *The Committee recommends that except in cases of urgent necessity no court should entertain an application for interim custody before pre-trial conferences had been conducted. The application for such an interim order should not be made in the absence of a report from a registrar on the outcome of the pre-trial conference.*

Recommendation 16

4.52 *The Committee recommends that except in cases of urgent necessity no interim custody order should be granted unless the other spouse has been served with notice of the proceedings. No court should grant such an order in the absence of a report from a court counsellor who has interviewed the respondent and advised that person of the implications of the order.*

It is recognised that there are practical obstacles to the implementation of this policy. Such orders are necessary, it seems, before the court will entertain an application under s.64 (9) for a warrant to obtain possession of a child unlawfully taken from that person's control. If this situation is to be overcome s.64 (9) may be amended to include in the order that the court may make not only an order with respect to the custody of the child but with respect to the care and control of the child. Moreover, a situation may arise where there is an order for joint custody in force with one person having care and control and the other the right to access. Section 64 (11) provides that where an order entitles more than one person to the custody of a child, a warrant shall not be issued for the removal of the child from the possession of one of those persons and the delivery to the other of them. This may have the effect, where the person with access does not relinquish the child, of leaving the other without remedy. Accordingly it may be necessary to amend section 64 (11) to avoid a party being without a remedy in such circumstances

4.53 It is not disputed that many of the difficulties being experienced by the court are the result of insufficient and inadequate staffing in the counselling area. The number of disputed cases could be substantially reduced if access could be had, within days of application to a conciliation service, as is proposed by us in chapter 10. If such a service as we propose were created and available, it is considered that the legal profession would make use of it. In our view the question does not arise of the conciliation service being an alternative to the service of the private legal profession. Each has different qualities and skills to offer.

Effect of Death on Custody Rights

4.54 Prior to the Family Law Act, custody automatically passed to the surviving parent upon the death of a parent awarded custody by the court. The Family Law Act s.61 (4) provides that the surviving parent must make application to the court for custody. Custody does not now pass automatically to the survivor. The constitutional validity of s.61 (4) was upheld by the High Court in the case of *Dowal* v. *Murray*.[35] In that case it was held by the court that once there has been proceedings between parties to a marriage concerning the custody of a child who was within the jurisdiction of the court, then all subsequent proceedings concerning custody were within the jurisdictional competence of the court. In the case of *E* v. *E*[36] the Full Court of the Family Court went further, and held that once there have been completed proceedings relating to the custody of a child of a marriage between the parties to the marriage, then it is open to any person to make application to the Family Court of Australia in relation to custody and access to that child, without prior leave, and without having intervened. This is the case even though only one of the parties to the marriage was a party to the completed proceedings and even though both parties were still alive.

4.55 Amendments to the Family Law Act in 1979[37] provided that on the death of a parent in whose favour a custody order has been made, the surviving parent *or any other person* may make application for custody. The result now is that where the custodial parent is survived by a former spouse, that spouse still has to apply for custody. However, third parties can now apply, whether or not the surviving spouse has applied. The criticism in some of the submissions that a third party cannot take the initiative to apply for custody, but must wait to intervene in proceedings brought by the surviving parent, has thus been met by the 1979 amending legislation and the decision in *E* v. *E*.

4.56 At the present time third parties can only initiate proceedings respecting custody and access under the Act where there had been completed proceedings involving one of the parties to a marriage. It would appear to be anomalous that a grandparent for example can institute proceedings in the Family Court where completed proceedings have occurred but must proceed in State courts where no earlier proceedings involving the parents of the child have taken place. To overcome this problem the Family Law Act should 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 of a marriage.

Given that the Act does not provide specifically for custody to vest in a person on the death of a custodial parent, an unseemly scramble by relatives to obtain the physical possession of the child on the death of the custodian can result. It has been suggested by the editors of C.C.H. *Family Law and Practice* that the Act should be amended to restore the situation that applied before the Family Law Act so that the surviving parent automatically obtains custody. In the Committee's view there are good reasons why custody should not automatically revert to a surviving parent. The circumstances of the child should be reviewed by the court so that any new custody order made is made with the interests of the child in mind. It should not merely be assumed that it must always be in the best interest of the child to be in the custody of a parent. The best solution would appear to be an amendment to the Family Law Act which would make a child automatically a ward of the court pending a review of the custody situation.

Recommendation 17

4.57 *The Committee recommends that s.64(4) of the Family Law Act be amended to provide that upon the death of a person awarded sole custody of a child, the child should become a ward of court pending the further order of the court. It is further recommended that the Act 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.*

Enforcement of Custody and Access Orders—

4.58 Sections 64, 68, 69 and 70 of the Act are designed to give effect to and facilitate the enforcement of custody and access orders.[38] The Law Council of Australia made the following statement in its submission to the Committee:

> Presently, there are serious deficiencies in the procedure for the enforcement of custody orders. These do not spring from a lack of power under the Act, but rather from a lack of implementation.

This submission is supported by a number of others, including that of the Judges of the Family Court which specifically directed the Committee's attention to problems with the enforcement of custody orders.[39] The main problems in this area are:

(a) Enforcement Officers

One of the Family Law Council's recommendations to the Attorney-General was that enforcement officers should be appointed pursuant to s.64(12) of the Act, that such officers should preferably be officers of the Family Court, and that their function would be to enforce custody orders particularly in tracing children who had been abducted. The Attorney-General informed the Council that the Australian Federal Police were willing to undertake inquiries to locate children who are the subject of warrants and that it was being considered whether any further action was still necessary. In its turn the Council informed the Attorney-General that it was not satisfied that this action will be sufficient to deal with the problem.[40] The Family Law Advisory Committee of the Law Council of Australia was also of the view that the efforts of the Australian Federal Police are insufficient on their own. Accordingly the Law Council recommended that steps be taken to ensure that State police officers assist in the enforcement of the Act. The Law Council and the Tasmanian Police Commissioner recommend that State Deputy Marshalls be appointed to perform the prescribed functions as well as to maintain contact with the relevant legal authorities concerning the enforcement of custody and access orders.

The Law Council also recommended that it would be an advantage if the Attorney-General were to prepare a pamphlet for the guidance of police officers, both Commonwealth and State, in respect of the operation of Family Court orders and enforcement of those orders. The Committee agrees with the suggestion that a booklet either be prepared or a loose leaf manual maintained.

Attention is drawn to the fact that while the Australian Federal Police are willing to co-operate in these matters, they do not have sufficient resources to enforce custody and access orders. However, the setting up and appointment of a new force of enforcement officers for the purpose of enforcing such orders, would be a very formidable and costly undertaking.

Recommendation 18

4.59 *It is recommended that some means be employed to formalise the use of State police forces to assist in the enforcement of custody and access orders. The Committee therefore considers that steps should be taken for the necessary arrangements to be made with State police forces as envisaged by s.112 of the Family Law Act.*

4.60 A marshall of the court has been appointed in the Family Court of Western Australia. The Committee was told by the Chairman of Judges of the court that this appointment had helped to alleviate the problem in that State.

Recommendation 19

4.61 *The Committee recommends that a marshall of the court as provided for in section 37(4), should be appointed to the Family Court in each State to liaise with State and Commonwealth police. Deputy marshalls should be appointed to registries in the States. Further, the Commonwealth should fund the States in respect of the cost of their police.*

(b) Release of Information by Government Departments

4.62 In its Second and Third Annual Reports, the Family Law Council considered the problem that can arise when a child is abducted and the address of the person who has the child in breach of a custody order, is known to the Department of Social Security or to another Government department but not known to the custodial parent. Judges of the Family Court and the Law Council of Australia referred to the matter in submissions to the Committee. The Judges of the Court and the Law Council stress the need to balance the interests of the child against the right to privacy of the parent. The Law Council specifically recommended:

> That the question as to whether a means can be found whereby information is released by Government departments to enable a custody order to be enforced should be investigated.

4.63 The current practice of the Department of Social Security in relation to this problem was explained by the Department:

> The current practice in respect of the Family Court is to disclose information as to the whereabouts of a child in a situation where a warrant has been issued under either Section 64(9) or 64(10) of the Family Law Act and the information is needed for the execution of a warrant. Information is provided to the Commonwealth Police through the Attorney-General's Department.
>
> Information is not disclosed to enable enforcement of a custody or access order where no warrant has been issued. This is done on the basis of advice received from the Attorney-General's Department that disclosure should be limited to cases where a warrant had been issued. The advice indicates that there are important differences in the consequences of disclosing information to enable service of an order and to enable execution of a warrant.[41]

Where a child has been abducted, and the whereabouts of that child are unknown to the person entitled to custody, the welfare of the child and the interests of the child in enforcing the custody order can outweigh the right of the party concerned to have his or her privacy maintained. The Committee concludes that it should be encumbent on Commonwealth Government departments with information that could assist in the recovery of a child, to disclose the address of the child for the purpose of enforcing the custody orders (or warrant, when issued).

Recommendation 20

4.64 *The Committee recommends that it should be clearly provided in legislation that in circumstances where a custody order cannot be enforced because a child's whereabouts are not known it shall be encumbent on Commonwealth departments of State having information concerning the whereabouts of the child to provide an authorised officer of the court with such information as he may require to enforce the orders and processes of the court. It is emphasised that any information released would relate only to the names and addresses of persons having illegal custody of the children and would be provided only to the marshall of the court, if one is appointed or otherwise to the registrar of the court.*

(c) Enforcement of Custody Orders Overseas

4.65 In its Second Annual Report, the Family Law Council referred to the lack of reciprocal arrangements between Australia and overseas countries for the recognition and enforcement of custody orders as an effective means of preventing child kidnapping, even though the Act provides for such reciprocal arrangements.[42]

4.66 The Department of Foreign Affairs informed the Committee that enquiries have been made with approximately twenty-five other overseas countries to determine whether they are interested in entering into arrangements with Australia for the reciprocal enforcement of custody orders. Two Canadian provinces, Alberta and New Brunswick, already have provisions enabling Australian custody orders to be recognised and enforced by the courts. However, other countries have indicated that they have no immediate intention of making provision for enforcement of foreign custody orders. Further, the custody laws of some other countries appear to be so different from those of Australia as to rule out the conclusion of arrangements with Australia for reciprocal enforcement of custody orders.[43]

4.67 New legislative and administrative measures have recently been announced by the Government to assist in the recovery of children who have been successfully removed from Australia.[44]

4.68 Australia is giving its full support to a new draft convention to remedy international parent abduction of children. Two meetings to draft the terms of the convention have already been held at The Hague. The emphasis in the new convention was to arrange for the return of the child to the country from which it was taken as quickly as possible. The rationale is that where a parent from whom the child is taken *immediately* seeks its return and it is in the interests of the child then it should be returned to the country where it normally lives.[45]

(d) The Cost of Fares Involved in Recovering a Child who has been Taken Abroad or Interstate in Defiance of a Custody Order.

4.69 This problem is still one of concern. The Law Council of Australia stated in its submission to the Committee that:

> Presently, where a child is taken interstate or out of Australia by a party, an order for the return of the child is difficult to enforce if the other party does not have the financial means available to travel to where the child is located. Legal Aid should be available to assist in such cases.
>
> As a matter of practice, the absconding party should be required to reimburse the Government for such costs.

Accordingly the Law Council recommended:

(a) That the Government make available sufficient funds each year to the Australian legal aid authorities to pay for travel expenses, accommodation and other expenses associated with travelling to the place (either interstate or overseas) to which a child has been taken, in order to secure the child's return. That the availability of such funds should be subject to a means test, less stringent in its operation that that which is presently applied by the Australian Legal Aid Office.

That the granting of such aid be conditional on the applicant:

(i) obtaining an order under s.70 for the return of the child; and

(ii) providing at least *prima facie* evidence of the unreasonable refusal of the other party to comply with the order.

(b) That s.117 of the Act be amended to ensure that the court has power to make an order directing the reimbursement of the Government for its expenses in assisting a party to regain custody of a child taken out of Australia or interstate.

4.70 The Government has since authorised the Attorney-General to grant financial assistance in deserving cases to assist a parent to institute legal proceedings overseas for recovery of his or her children removed from Australia by the other parent.

Recommendation 21

4.71 *The Committee recommends that a party absconding with a child should be required to reimburse the Government for any costs associated with the recovery of such a child. Therefore s.117 of the Family Law Act should be amended to put beyond doubt that the court has power to make an order directing the reimbursement of the Government for its expenses in assisting a party to regain custody to a child taken interstate or out of Australia.*

ENDNOTES

[1] F. M. Horwill—*Study in the Outcome of Custody Cases in the Family Court of Australia*—June 1979. This study, carried out by project officers of the Family Court counselling service, was based on a sample of 430 cases randomly selected from all registries of the Family Court in the first half of 1977.

[2] In evidence to the Committee on Friday 6 July 1979 Evatt, C. J., provided recent statistics that confirmed a trend towards fathers obtaining custody in defended cases. Custody was awarded to fathers in approximately 40 percent of cases of a sample studied by the court registrar on May 1979. The study, which was based on all registries looked at the last 5 defended custody cases by each Family Court judge. The wife got custody in 48 percent of contested cases and the husband got custody in 40 percent; in 12 percent of contested cases joint custody was awarded (see transcript of evidence p 5757). Information given to the Committee earlier, Tuesday 10 April 1979, by the Chairman of Judges of the Family Court of Western Australia, Barblett J., supported the existence of this trend, (see transcript p. 2956). However, it was agreed that further studies were needed to confirm the existence of this trend.

[3] Horwill—op. cit.

[4] Goldstein, Freud, Solnit—*Beyond the Best Interests of the Child*—Free Press, New York (1973).

[5] A definition of private ordering attributed to Professor Don Fuller of Harvard University is ' "law" that parties bring into existence by agreement'. An example would be the provisions of s.87 of the Family Law Act which enables parties to register their own agreements which take effect in substitution for rights accorded by the Family Law Act.

[6] R. H. Mnookin and L. Kornhauser—*Bargaining in the Shadow of the Law: The Case of Divorce*—Yale Law Journal, U.88 (no. 5) April, 1979.

[7] Ibid. p. 951.

[8] Ibid. p. 969.

[9] Under the Matrimonial Causes Act it had been held (*Moore* v. *Moore* (1973) 2 ALR 14) that the court's power was limited to either accepting or rejecting the arrangements made by the parties. It seems to be the view that the powers of the Family Court are similarly limited.

[10] H. A. Finlay—*Family Law in Australia*—2nd Ed. Butterworths at para 694.

[11] Ibid. para 696—it was constitutionally possible to retain the wider class for the purposes of s.63(1) because while it is outside the power of the Commonwealth to legislate for the welfare of a child of only one of the parties to a marriage, it

is possible to use the welfare of such a child as a condition annexed to a matter which is manifestly within Commonwealth power (i.e. dissolution of a marriage).

[12] J. Eekelaar and E. Clive—*Custody after Divorce*—Centre for Socio-Legal Studies, Wolfson College, Oxford, para 13.20, pp. 71-72.

[13] *Hewer* v. *Bryant* (1970) 1 QB 357 at p. 372.

[14] J. Eekelaar—*What are Parent's Rights?* 1973 89 LQR, p. 210 at p. 230.

[15] Finlay and Bissett-Johnson, op. cit. p. 533.

[16] Re W. (J.C.) 1964 CH 202 per Ormerod J. at p. 210.

[17] After some early uncertainty (see *Forsyth* v. *Forsyth* (1974) 2 ALR 533), it has now been determined authoritatively that the court as a statutory court had no inherent powers of *parens patriae* in wardship proceedings (*Lamb* v. *Lamb* (No. 1) (1977) FLC 90-225).

[18] *Third Annual Report of the Family Law Council*—para 87, p. 16.

[19] *Demetriou* v. *Demetriou* (1976) FLC 90-102 at pp. 75466-75467:

[20] *Todd* v. *Todd* (1976) FLC 90-001; *Pailas* v. *Pailas* (1976) FLC 90-083; *Demetriou* v. *Demetriou* (1976) FLC 90-102, *Lyons* v. *Boseley* (1978) FLC 90-423.

[21] In this case Evatt, C. J. and Pawley, S. J. expressed the following 'tentative' views on this matter:
The views we express should be seen as no more than tentative, since the issue does not strictly arise for determination. Practice and time will enable the function of children's legal representatives to develop in a manner best suited to the needs of a particular child in a particular case.
In general terms, the functions of a lawyer appointed under s.65 include the following:
(a) to cross-examine the parties and their witnesses;
(b) to present direct evidence to the Court about the child and matters relevant to the child's welfare;
(c) to present, in appropriate cases, evidence of the child's wishes.
In many instances the evidence under (b) and (c) will be provided in the form of a Court Counsellor's report. This should not, however, preclude the child's representative from presenting evidence from other sources about those matters, including evidence of the child's wishes, by an independent witness. In putting a child's wishes to the Court, two factors should be kept in mind: first, that the child should remain free to abstain from expressing any view; and secondly, that evidence given by a party, a witness or a counsellor about the child's wishes should be capable of testing by cross-examination, with leave of the court where necessary.
The opinions available to the court for obtaining information about the child's wishes are few. It is often considered undesirable for the child to be a witness and there are disadvantages attached to a private judicial interview though that course is not precluded (reg. 116). The child's legal representative may have to find a means of placing evidence before the Court in order to ensure that s.64 (1) (b) is complied with. The options should not be closed off in too sweeping a fashion.
In carrying out his function, the legal representative is free to interview the child. We agree that the lawyer should explain to the child what his duty is in the proceedings.
The relationship between the legal representative and the parents (or other parties or intervenors claiming custody) is more difficult to define. The child's representative is not, of course, precluded from taking part in negotiations, for example, to settle the terms of access, in the same way as other legal representatives. Because of his special role in relation to the child, it may be appropriate for him to discuss matters directly with the contesting parties This should occur only with the knowledge and approval of their own legal representatives.
Subject to what has been said, it would not generally be desirable for the child's representative to interview directly the contesting parties (or intervenors seeking custody or access). The representative's normal function is to lead evidence from witnesses, to cross-examine parties and to make submissions.
For a more detailed examination of these tentative views offered by the majority judgment in *Lyons* v *Boseley*, see the individual judgment of Wood, J. in the same case.

[22] P. E. Nygh—*Guide to the Family Law Act 1975* pp. 85-86.

[23] Submissions to Inquiry by Dr G. Nance and South Australian Liberal Party, Women's Council.

[24] Private Submission to the Inquiry.

[25] Submissions to the Inquiry by L. V. Harvey; Family Law Practitioners' Association of New South Wales; Australian Legal Aid Office.

[26] Submissions to Inquiry by Catholic Women's League; Women's Action Alliance; Social Questions Committee of Church of England.

[27] Family Law Council, *Working Paper No. 2, Children's Wishes: Section 64(1) (b) of the Family Law Act 1975*, July, 1978.

[28] This is set out in section 402 of 'The *Uniform Marriage and Divorce Act* 1970' and states:
Custody: Best Interests of the Child Shall Determine:
1. The Court shall determine custody in accordance with the best interests of the child The Court shall consider all relevant factors including:
   (a) The wishes of the child's parents or parent as to his custody;
   (b) The wishes of the child as to his custodian;
   (c) The interaction and interrelationship of the child with his parent or parents his siblings and any other person who may significantly affect the child's best interests.
   (d) The child's adjustment to his home, school and community; and
   (e) The mental and physical health of all individuals involved.
2. The Court shall not consider the conduct of a proposed custodian that does not affect his relationships to the child

[29] *Raby* v. *Raby* (1976) FLC 90-104. This position has now been endorsed by the High Court of Australia in its recent decision in *Gronow* v. *Gronow* (1979) FLC 90-716. This appears to be the established position taken by the courts in regard to the mother's role.

[30] The statement by Hutley, J. A. in *Barnett* v. *Barnett* (1973) ALR 19, appears to be the accepted authority on this matter and it has been recognised as such by the Family Court (see for example *Heldt* v. *Heldt* (1976) FLC 90-077).

[31] The attitude of the courts is supported by the findings of social science:

> Until comparatively recently, little was known about the dangers to a child's mental and physical health which could conceivably flow from any change of care. It was comfortably assumed that, although the child would quite naturally suffer distress, he or she would soon 'get over it' and no long term or even short term detriment to health would be suffered.
>
> . . . however, we now know a very great deal more about the possible ill-effects of a change of care on a child's mental and physical health. Today, most child psychologists believe that even without any special aggravating features in any individual case, there is always a risk that a child may suffer severe emotional disturbance if he is removed from an established home where he is happy and adjusted. At best, the disturbance may only be temporary, at worst, it can seriously impair the child's emotional development towards mature and responsible adulthood. It is also widely accepted that the gravity of the risk varies with the age of the child, so that on the whole, the risk becomes more serious as the child grows older.
>
> N. Michaels *The Dangers of a Change of Parentage in Custody and Adoption Cases* 83 LQR 547.

[32] S. R. Hirst and G. W. Smiley—*Access-what is really happening?*—(unpublished), Brisbane, November, 1979 incorporated in the records of the Inquiry as exhibit 67.

[33] Solnit, Freud and Goldstein, op. cit. p. 38.

[34] *Gronow* v. *Gronow* (1979) FLC 90-716.

[35] (1978) FLC 90-516.

[36] (1979) FLC 90-645.

[37] *Family Law Amendment Act* 1979, section 9.

[38]
- Section 64 (5) empowers the court to order that the passport of the child and of any other person concerned be delivered up to the court, where the court is of the opinion that a child will be removed from Australia.
- Section 64 (9) and (10) enables the court to issue warrants authorising the person to whom the warrant is addressed, to stop and search a vehicle, or to enter and search premises, for the purposes of taking possession of a child, the subject of a custody order, and deliver the child to the person entitled under the order. Section 64 (10A) and (10B) provide that such a warrant may be addressed to a named person or persons or to Commonwealth, State or Territory police officers.
- Section 64 (12) authorises the Attorney-General to appoint Enforcement Officers for the purpose of Part VII of the Act. Under s.64 (13) such an Enforcement Officer may be a named person or a Commonwealth, State or Territory Police Officer. Warrants under s.64 (9) and (10) may be addressed to such Enforcement Officers (s.64 (10B)).
- Section 70 prohibits interference with a child the subject of a custody order, and lays down stringent penalties for any person who does so interfere.
- Section 68 provides for the recognition in Australia of custody orders made in prescribed overseas countries and duly registered in Australia.
- Section 69 provides for the transmission from Australia to prescribed overseas countries of custody or access orders made in Australia.

[39] See also recommendations of the Family Law Council in its First, Second and Third Annual Reports, 1977–1979.

[40] Ibid. paras 52-53.

[41] Submissions to the Committee by the Department of Social Security—G. Release of Information. Note: The secrecy provisions contained in s.17 of the Social Services Act prevent the disclosure of confidential information except with the express of implied authority of the client concerned or where the Minister or Director-General certifies that it is in the public interest.

[42] Family Law Council Second Annual Report, paras 54-55; Third Annual Report paras 78-79.

[43] Press Release by the Attorney-General, 26 August 1979. See also Family Law Council, Third Annual Report 1979, paras 80-81.

[44] These measures include:
- Revision of ss.62 and 63 of the *Migration Act* 1958, which provide for offences in respect of the removal and carriage from Australia of children in respect of whom custody or access orders have been made or are being sought, to give them broader application and relocation of the provision to the *Family Law Act* 1975 where their existence should become more generally known.
- Improving procedures for the entry of details of some children on warning lists and tightening of checks at departure points.
- Officers of the Department of Immigration and Ethnic Affairs and Business and Consumer Affairs stepping up at departure points identification checks on children who are accompanied by only one parent.
- Tightening parental consent requirements for the issue of passports to children leaving Australia.
- Providing courts and legal practitioners with detailed information on available preventive measures and proposals for new measures in a form which could be distributed to the public.
- Approaches to courts to achieve better communication of orders for delivery up of passports by applicants to police and foreign embassies and consulates in Australia.
- Requesting foreign diplomatic missions in Australia to decline passport facilities in respect of children who they are informed or who they have reasonable cause to believe are the subject of Australian court orders for delivery up of passports.

- Additional and further approaches to other countries, to secure arrangements for the reciprocal enforcement of custody orders between Australia and those countries.
- Continued participation by Australia in discussions in The Hague Conference on Private International Law on the proposed international convention on the specific problem of child removal.
- Authorisation of the Attorney-General to grant financial assistance in deserving cases to assist parents to institute legal proceedings overseas for recovery of their children removed from Australia by the other parent.
- Inclusion of the problem on the agenda in future discussions between Australia and New Zealand on travel arrangements between the two countries.
- Further, the States would be asked to co-operate in making information on measures to prevent removal of children from Australia available from magistrates' courts.

[45] Press Release by Attorney-General, 3 April 1980.

Chapter 5

THE FINANCIAL CONSEQUENCES TO THE PARTIES OF DIVORCE

Maintenance

5.0 Beginning in New South Wales in 1840, the colonies and later the States of Australia passed a series of Acts generally referred to as the 'Maintenance Acts', these Acts remain in force today to the extent that they are not overridden by the Family Law Act. In the 1960's all the States substantially revised their Maintenance Acts in an attempt to achieve uniformity. Basically, the Maintenance Acts conferred jurisdiction on the magistrates' courts to make orders against a man for the support of his wife and children (both legitimate and illegitimate) and in certain circumstances against a woman for the support of her husband and her children (both legitimate and illegitimate). In the Tasmanian legislation there is power to make an order against a man for the support of his *de facto* wife.[1]

5.1 The right of a married woman to obtain an order under the States' maintenance legislation depended on her showing that her husband had 'without just cause or excuse' deserted her or failed to provide her with adequate means of support. The words 'just cause or excuse' were important because if the husband could show that he had 'just cause and excuse' for failing to provide maintenance for the wife (if she was guilty of desertion or adultery) her claim for maintenance had to fail. There was no discretion in a court exercising jurisdiction under the States' Maintenance Acts to award maintenance to a wife guilty of a matrimonial offence as there was under the Commonwealth Matrimonial Causes Act and its State predecessors.[2]

5.2 If a husband wished to claim maintenance from his wife under the Uniform Maintenance Act of the States, he had to establish that his wife had deserted him or without just cause neglected to provide him with adequate means of support. But he also had to show that he was unable through illness or other reasonable cause to support himself adequately.[3] Once their marriage was dissolved either under a State divorce law (prior to 1961) or under the Commonwealth Matrimonial Causes Act (after 1961) the right of a wife or a husband to claim support from the other spouse under the State maintenance legislation as a general rule, ceased. The matter of maintenance came within the jurisdiction of the divorce court.[4] The operation of the State maintenance legislation has been considerably curtailed since the introduction of the Family Law Act. The Family Law Act now regulates all maintenance between people who are, or have been, married and the children of such marriages.

5.3 The power to award maintenance under the Matrimonial Causes Act was contained in s.84. In sub-section (1) of that section the court was empowered in proceedings with respect to the maintenance of a spouse or of a child of a marriage, to make such order as it thought proper 'having regard to the means, earning capacity and conduct of the parties to the marriage and all other relevant circumstances'. The Matrimonial Causes Act (s.84(3)) specifically provided that an order for the maintenance of a 'guilty' party could be made. Early in the life of the Matrimonial Causes Act it was held that the court had a discretion as to whether or not it awarded maintenance to a guilty party.[5] Nevertheless, it appears that under the Matrimonial Causes Act the position became that:

- a 'guilty' wife would not normally be entitled to maintenance against an 'innocent' husband unless she was by reason of her responsibility for young children, unable to support herself;[6]
- a matrimonially 'innocent' wife was entitled to 'handsome maintenance' from her 'guilty' husband; the fact that she was able to support herself entirely by her own earnings did not deprive her of this right even though it might reduce the amount she would otherwise receive.[7]

5.4 The powers of the Matrimonial Causes Act with respect to Maintenance (s.84) and Property (s.86) were held by the High Court in the case of *Sanders* v. *Sanders*[8] to be closely related. The relationship between the two powers was explained by Windeyer, J.:

> The power (under s.84) to make an order for maintenance and the power (under s.86) to order settlement are not mutually exclusive. They overlap and may be exercised separately or in combination to produce a total result which in the circumstances of the case is just and equitable. An order under s.86 may be a means of providing maintenance... There is a distinction between s.84 and s.86(1). But it is not, as I read the Act, a distinction between two different ends; rather it is between two different means directed to the same end, a just and equitable arrangement of proprietary rights and interests, ancillary to one of the forms of principal relief for which the Act provides.[9]

5.5 In the Family Law Act, as originally enacted, the Commonwealth attempted to remedy the fragmented jurisdictional situation existing in Australia in 1975 with regard to family property and maintenance law. Until divorce, such matters were dealt with under the States' Married Women's Property and Maintenance legislation. On the institution of divorce proceedings such matters fell for determination under the Commonwealth Matrimonial Causes Act. The Commonwealth attempted to remedy this situation by bringing all family property and maintenance matters, whenever arising, within the jurisdiction of one Act.

5.6 So far as maintenance was concerned this attempt was largely successful. The result is that all maintenance matters between spouses, either during or after marriage and with respect to children are now determined under and in accordance with the principles of the Family Law Act. Such matters may, however, still be heard in magistrates' courts. The provisions of the Family Law Act with regard to maintenance represent a significant departure from the previous law. It introduces a statement of the principles governing the liability of both spouse to maintain their children. The principle for determining the liability of one spouse to another becomes one of means and needs. Gone now is the element of matrimonial fault which previously was an essential ingredient of the States' Maintenance Acts and under the maintenance provisions of the Matrimonial Causes Act. The principle of the Matrimonial Causes Act and earlier State divorce legislation, that maintenance is a matter for the court's discretion is retained, but the Family Law Act defines in far greater detail than hitherto the matters which the court must take into account in exercising its discretion. The Family Law Act also maintains the possibility that a wife might be ordered to support a husband.

Maintenance Provisions of the Family Law Act

5.7 Part VIII of the Act deals with Property and Maintenance. Section 72 deals with the obligation of spouses to maintain one another. Section 73 imposes an obligation on both parties to a marriage to maintain the children of the marriage. This accords with the principle of joint rights and responsibilities for the welfare of children which is a feature of the Act. The court is empowered by s.74 to make such orders as it thinks

proper in proceedings with respect to spouse and children's maintenance. But this discretion is qualified by the provisions of sections 75(2) and 76 which enumerate the matters the court is required to take into account. The Matrimonial Causes Act, (s.84(1)) had simply provided that the court could 'make such orders as it thinks proper having regard to the means, earning capacity and conduct of the parties to the marriage, and all other relevant circumstances'.

Section 72 states:

> A party to a marriage is liable to maintain the other party, to the extent that the first mentioned party is reasonably able to do so, if, and only if, that other party is unable to support herself or himself adequately, whether by reason of having the care or control of a child of the marriage who has not attained the age of 18 years, or by reason of age or physical or mental incapacity for appropriate gainful employment or for any other adequate reason, having regard to any relevant matter referred to in sub-section 75(2).

5.8 In relation to s.72, decisions of the court have indicated the possibility of three different interpretations of the phrase 'having regard to any relevant matter referred to in section 75(2)'. On the first interpretation, attention would only be directed to the matter enumerated in s.75(2) if the need for maintenance could not be established by reference to the provision of s.72 itself. It would only be relevant to determine whether there was any other 'adequate reason'. On the second interpretation, s.75(2) would be considered in the interpretation of the phrase 'that the other party to the marriage is unable to support himself or herself adequately'. 'Any other adequate reason' would be given equal weight in determining this matter with the two matters of responsibility for a child and fitness for employment to which s.72 makes specific mention. The third interpretation which is presumably the intended interpretation reads 's.72 as being governed in all respects by s.75(2) so that the listed factors would be taken into consideration by the court in relation to all aspects of the provision'.

Recommendation 22

5.9 *The Committee recommends that s.72 be amended to read:*

(i) *A party to a marriage is liable to maintain the other party to the extent that the first party is reasonably able to do so, if, and only if, that other party is unable to support herself or himself adequately whether:*
   (a) by reason of having the care and control of a child of the marriage who has not attained the age of 18 years, or
   (b) by reason of age or physical or mental incapacity for appropriate gainful employment, or
   (c) for any other adequate reason.

(ii) *In considering whether a party to a marriage is unable to support himself or herself adequately by reason of the matters contained in paras (a), (b) and (c) of subsection (1) the court shall have regard to any relevant matter referred to in s.75(2).*

Application of Criteria in section 75

s.75(2) (a):

- the age and state of health of the parties.

5.10 In relation to s.75(2) (a) the Committee was told that this is always a factor to be taken into account, but every judge seems to take it into account in a different way. In some cases, the fact that the wife is young is seen as a need to make provision for the wife of an enduring kind. In other cases, the fact that the wife is young is seen as

a reason why she does not need maintenance. She can go and support herself. In some cases, the fact that she is old is seen as an indication that there must be support. In other cases, the fact that she is old is seen as suggesting that she does not need support because she can draw the age pension.

s.75(2) (b):

- the income, property and financial resources of the parties and the physical and mental capacity of each for employment.

5.11 The judge looks first to the wife's need. Having worked out a basis for what the wife needs, he then turns to a consideration of the extent to which the husband can afford to meet those needs. So, apart from the particular problem which may attach to another sub-section, the basic operation is always to have regard to income, property and financial resources of each of the parties and their physical and mental capacity for employment or in supporting themselves. Essentially, it is sub-paragraph (b) which is always the vital operative provision.

s.75(2) (c):

- whether either party has the care of a child under 18.

5.12 The Committee was informed that this provision was usually considered together with s.75(2) (b) above.

s.75(2) (d):

- the financial needs and obligations of each of the parties.

5.13 The question of comparison only arises if the applicant's reasonable needs are in excess of income and if the respondent's available income is in excess of reasonable needs. This will sometimes involve a comparison between the living standards of the applicant and respondent respectively. The court must first establish the reasonable needs of the applicant and the extent to which these needs cannot be met out of current resources. This establishes a right to maintenance in the applicant. It is only then that it is relevant to consider the financial needs of the respondent and the income remaining when those needs have been met.

s.75(2) (e):

- the responsibilities of either party to support any other person.

5.14 The sort of responsibility most frequently encountered are towards elderly relatives, children other than children of the marriage, a second wife or *de facto* spouse. In general the responsibility of the applicant to support persons other than children of the marriage will not give rise to an obligation in the respondent. The responsibility of the respondent towards dependants, however, will be taken into account in assessing the need for income. Some cases decided under the Matrimonial Causes Act supported the proposition that a husband had an obligation to his wife and family in priority to obligations that might have been incurred since separating from his wife. Under the Family Law Act the proposition has been rejected. It has been held that s.75(2) (e) requires the court to take responsibilities towards such new dependants into account in determining a respondent's ability to pay maintenance.[10]

s.75(2) (f):

- the eligibility of either party for Commonwealth or State pension benefit, or the rate of any such pension, allowance or benefit being paid to either party.

5.15 The interpretation of this provision has caused problems. The problem arises because of the interactions between the maintenance provisions of the Family Law Act and the provisions of the *Social Services Act* 1947. A relationship between these two statutes arises in two ways. In the first place it is provided in s.62(3) of the Social Services Act that a pension shall not be granted to a widow, being a deserted wife or a woman whose marriage has been dissolved and who has not remarried unless she has taken such action as the Director-General considers reasonable to obtain maintenance from her husband or former husband (it is similarly provided by s.83AAD in relation to supporting mothers' benefit). It has been a frequent recommendation that these provisions of the Social Services Act be abolished.[11] The Senate Standing Committee on Constitutional and Legal Affairs in its report on the clauses of the Family Law Bill observed:

> While the orders for maintenance and custody currently made by magistrates under State jurisdiction are substantial in number, the Committee recognises that a large part are caused by the statutory requirement that deserted wives must apply for and enforce orders before their eligibility for (or continuance of) a deserted wife's pension is approved. We recommend that s.62(3) of the *Social Services Act* 1947–1974 be amended to dispense with this requirement. It is a cause of unnecessary litigation and disharmony and the Department should be empowered to recover contributions from husbands without this requirement. Furthermore, Clause 54(2) (e) (i.e. 75(2) (f)) of the Bill already contemplates the taking into consideration of pension entitlements on applications being made for maintenance orders. This change should reduce substantially the volume of maintenance applications.

However, because of the interpretation placed on the provision by some decisions of the Family Court section 75(2) (f) has not always had this anticipated effect.

5.16 The Department of Social Security informed the Committee in relation to the provisions of s.62(3) of the Social Services Act that the provision is designed to ensure that people who are in a position to do so are not relieved of their obligation to contribute to the support of their families. Following the introduction of the Family Law Act it was decided as an interim measure that claims for widows' pension and supporting parents' benefit should not be automatically rejected merely because the claimant had not taken action for maintenance. However, any maintenance awarded is taken into account as income for the purposes of assessing the rate of benefit. The Department told the Committee that there are no immediate plans to suspend the operation of this interim measure. If it is suspended in the future, comprehensive guidelines as to what would constitute reasonable action for maintenance would be issued.

5.17 It is undeniable that there has been a significant growth in the payment of pensions attributable to marriage breakdown in recent years. However this growth preceded the introduction of the Family Law Act, and has been particularly apparent since the introduction of (a) the tapered means test in 1969 which halved the severity of the income test as it applied to income and property in excess of the allowed free area; (b) the liberalised means test in 1972 which doubled the amount of income or property allowed before the means test commenced to operate; (c) and the introduction of the Supporting Mothers' Benefit in 1973 and its expansion to the Supporting Parents' Benefit in 1977.[12] The principal benefits payable are widows' pensions and supporting parents' benefits. A class 'A' widows' pension is payable in respect of a deserted wife responsible for the care of children. A deserted wife with no dependent children may be eligible for a class 'B' widows' pension. To qualify for a widows' pension the applicant must establish that she has been deserted by her husband without means of support. In administering the Social Services Act therefore, the Department of Social Security applies tests based on matrimonial fault grounds that no longer

apply under the Family Law Act. These requirements have meant that many women have preferred to seek supporting parents' benefits. Eligibility for this is not dependent on the applicant establishing fault on the part of the person liable for support. This has been done even though the quantity of pension entitlements is less than for a Class 'A' widows' pension. Status of pensioner entitles the recipient to a range of fringe benefits The benefit recipient, under the income test, is entitled to receive $25 weekly income before the pension is affected, it being reduceable thereafter at the rate of $1 for every $2 earned.

5.18 Under the Social Services Act a benefit is not payable until six months after application has been made, during which time, according to the Department, the applicant should be able to proceed against the liable relative for maintenance. However, a person without support will usually be able to obtain a benefit payable under State law during this interim period. The policy of State departments is also to require maintenance proceedings to be instituted.

5.19 The requirement that an applicant for benefits should take proceedings for maintenance means that there are many more cases coming before the court than would be so if the requirement was deleted. It means that the courts are frequently placed in a dilemma when determining what amount of maintenance a former husband should pay where his wife, the applicant, is either receiving or may be eligible to receive a government financed pension. If as section 75(2) (f) seems to indicate this entitlement is taken into account in determining the means of the wife, the purposes of the compulsory maintenance provisions of the Social Services Act are largely defeated. The court would order the husband to pay such amounts as will not affect the wife's entitlement to the pension. The reasoning in such cases is illustrated by an extract from a judgment of the Family Court:

> I am quite satisfied that, leaving aside the fact that the wife receives the special benefit pension, the wife reasonably requires at least $60 per week to support herself. If I order the husband to pay such sum by way of maintenance of the wife, her special benefit payment would totally cease, and if the said $60.00 per week were regularly paid by the husband, the wife would be better off financially by $2.55 per week (i.e. $60 less the amount of benefit previously being paid) a negligible sum; thus the husband's financial position and standard of living would be drastically reduced, the wife would lose the security of the regular pension payments, the husband would have this substantial financial burden for an indefinite time to come.[13]

In this case Mr Justice Bulley concluded that s.75(2) (f) enabled him to take the benefit that might be payable into consideration. He accordingly made an order that the husband pay a lump sum on account of maintenance to the wife which sum when invested would not produce sufficient income to affect the wife's entitlement to social security.

5.20 Another line of cases, however, proceed according to the first construction of s.72 referred to in para 5.8. In this view social services entitlements are irrelevant in considering whether the applicant could be said to be unable to support herself.[14] Whilst this approach is consistent with the logical reading of the Family Law Act as it is drafted, it is clearly contrary to the intention of the legislature as revealed in the extract from the report of the Senate Standing Committee on Constitutional and Legal Affairs quoted in para 5.15. If the recommendation as to the re-drafting of section 72 were to be inserted in the Act this would have the effect of directing an interpretation of section 72 in line with the Senate Standing Committee's original understanding of how it would operate. This would defeat the purpose of the compulsory maintenance provisions of the Social Services Act.

5.21 In view of this conflicting line of interpretation of s.75(2) (f) the Committee has had to consider whether the Act should be amended so as to make it clear to courts which of these two possible approaches should be adopted. It appears to the Committee that the court is placed in an invidious position when called upon to determine the implications of its judgment on a means tested pension. The case for ignoring social services in determining the needs of the dependent spouse and therefore the liability of the supporting spouse is based on the principle that private obligations between the parties should be paramount. A derivative of this principle is that families should be supported by private rather than public means. Section 72 of the Family Law Act, it is said, gives primacy to private support. Persons who are capable of maintaining their spouses and children should not be relieved of their responsibilities merely because the dependent spouse is eligible for social services. The taxpaying community should not be required to subsidise marriage breakdown by increasing the financial resources available to a family.

5.22 On the other hand, the case for recognising social security as an assured income, reducing the needs of the dependent spouse and therefore the amount to be obtained from the supporting spouse, is based on a recognition that marriage breakdown often creates economic hardship for all the parties concerned. Resources formerly devoted to the support of one family are divided between two households, often involving new dependants. If the resources are modest the supporting spouse is unlikely to have the capacity to pay substantial maintenance. The higher the amount of maintenance ordered, the greater the likelihood of default. The dependent spouse then faces the difficulty of enforcing the maintenance order and may eventually be compelled to resort to the social security system for sole support. By contrast, if a court proceeds on the basis that the dependent spouse may obtain a regular, secure income from social services, it may order lower amounts of maintenance which do not reduce the supporting spouse and his dependants to a subsistence level, and which are therefore more likely to be paid and to supplement the social services income.

5.23 It has been argued that the taxpayer's burden would probably be relieved only marginally if the courts were to attribute a supplementary rather than a primary role to social security in family support. Savings would be made only by enforcing maintenance orders which exceed the maximum income allowance under the means test. The cost of enforcing maintenance payments, in terms of the resources used by the court's legal aid and enforcement agencies, while never calculated precisely, is likely to counterbalance savings on social services. And, finally, since enforcement is not always successful, the dependent spouse ultimately turns to social security.

5.24 A number of arguments are advanced for the retention of the link. It is said for instance that a reduction of welfare expenditure is occasioned thereby. In this connection it was noted by the Commission of Inquiry into Law and Poverty:

> The simplest argument in favour of compulsory action is that welfare expenditure is substantially reduced by placing the burden of support of fatherless families on the legally responsible males rather than on the taxpayers. The contention would be compelling if the requirement had this effect. The overwhelming probability is that the requirement, at best, shifts only a tiny proportion of the cost of supporting fatherless families from the public purse. There is some evidence that in Australia as in the United Kingdom the great majority of maintenance orders are for relatively small amounts. The reason is simply that maintenance orders are made after taking into account the means of the dependant and nearly always his income is insufficient to support two families adequately. More to the point, maintenance orders are extraordinarily difficult to enforce and compliance appears to be the exception rather than the rule, suggesting that the institution of legal proceedings may do little to shift the burden of support.[15]

5.25 A further argument is that the requirement acts as a check on the authenticity of claims by safeguarding against dishonest collusion. Whilst it might act as a check in some cases, there is evidence that in others, collusion can actually be fostered. This can happen where a separating couple collude to ensure that the wife gets the maximum supporting parents' benefit and the husband pays the lowest possible maintenance. Officers of the Department of Social Security in their evidence to the Committee observed:

> But one point that is worth mentioning is that in addition to the attitudes of the courts themselves, I suspect—and that is a nasty word—that the legal advisers of both the husband and the wife often tend to put their heads together to see what sort of level of maintenance might be arrived at which would be not too unreasonable as far as the husband is concerned and would not prejudice the pension rights or benefit rights of the wife.[16]

5.26 As long as proceedings in the Family Court are closed, welfare departments are not in a position to observe proceedings where the means of the parties are in issue or to obtain transcripts of the proceedings. They are simply confronted with determinations by the court as to means and obligations.

5.27 The Committee has concluded that the continued existence of the compulsory maintenance provisions has undesirable consequences for the administration of Family Law. They are the source of quite unnecessary complexity and confusion in this area and should be repealed as a matter of urgency. In reaching this conclusion we are not to be taken to support the proposition that the obligation to support relatives should be transferred from the individual to the State. On the contrary, we consider that that obligation should be made quite clear and enforced more effectively than it is now being enforced.

5.28 The welfare systems should be self-sufficient. To the extent that it is necessary to proceed against the spouse of a social security client to obtain a contribution towards the support of that client, then the Department should be in the position to institute proceedings under its own legislation. It should be provided with the means to assess the income of the applicant and the capacity of liable relatives to contribute towards the support of the applicant. This situation applies in New Zealand and in the United Kingdom where the Supplementary Benefits Commission is empowered to recover the amount of benefits paid to a client from the 'liable relative' of the client. Although the provision of section 22 of the *Social Security Act* 1966 (U.K.) has been in the legislation for some time, it was the administration of the system which has given rise to problems which were noted by the Finer Committee on One Parent Families. That Committee considered that the legislation (i.e. the *Social Security Act* 1966) should not be so couched as to induce applicants to pursue maintenance orders through the court. Rather, benefits should be payable to an applicant who can establish a need, leaving it to the Supplementary Benefits Commission to recover from liable relatives according to their means:

> Subject to factors of this kind, the lone mother applying for supplementary benefits will be treated as though she were a single person, such as a widow, with no legal entitlement to maintenance against any other person. This means that in contrast with existing procedures of the Commission, no encouragement will be offered by the Commission to the lone mother to bring legal proceedings of her own against the liable relative. Once it has established her entitlement to supplementary benefits, the amount of which will be calculated without reference to any claim she may have for maintenance, the lone mother will normally have no financial interest, and be under no inducement to pursue the liable relative for maintenance, nor will she be concerned with the assessment or enforcement by the Commission of the amount which they require the liable relative to pay to them by way of re-imbursement of the supplementary benefits they are paying her. Assessment and enforcement of the liable relative's contribution will be regarded as processes which take place entirely between the Commission and the liable relative, and which do not involve the lone mother.[18]

5.29 The Committee concludes that the law should re-inforce the policy that, wherever possible, families should be supported by private rather than public means. In furtherance of this policy, relatives should not be in a position to transfer their obligations to support relatives to the community at large where they are, financially, in a position to contribute to the support of those relatives. At the same time those without adequate means of support should be entitled to sustenance from the State to the extent of their need. This entitlement should not be dependent on the pursuit of often futile remedies for maintenance. However, the State through the Department of Social Security should be empowered to pursue and recover from liable relatives such contributions towards support as is reasonable in the circumstances.

Recommendation 23

5.30 *It is recommended, therefore, that the Social Services Act be amended to delete section 62 (3) and 83 AAD with a new provision to be inserted that would have the effect that:*

(1) *the Department of Social Security will assess the means of the liable relative and determine what it is proper for him to pay to the Department in or towards satisfaction of the money they have paid out;*

(2) *the Department will be entitled to order the liable relative to pay the Department the amount so assessed. For the purposes of exposition we shall call such an order by the Department an 'administrative order';*

(3) *subject to rights of review and appeal, the administrative order will be legally binding on the liable relative and enforceable against him by the Department through normal court processes;*

(4) *the amount of the administrative order will in no case exceed the amount of the applicant's entitlement to social service benefits. Within this limit the amount will be within the Departments discretion. In exercising this discretion, the Department will act in accordance with published criteria for assessment, framed so as to produce a fair result in the normal run of cases; but the discretion will always be available to allow for individual circumstances;*

(5) *the Department will never be in a position of having to pass judgment on matrimonial conduct.*

5.31 Removal of the compulsory maintenance requirements would mean that many proceedings now brought simply because of the requirement, would not be brought. Where a deserted wife was aware that proceedings against her husband would be futile she could elect to seek support from the Department which would recover what it could from the husband. This would be of advantage to many women in that precarious situation. However, one effect of this proposal should be noted. It is now possible for a supporting parent to receive the benefit, plus maintenance of $25.00, without affecting the pension entitlement. This results from the operation of the income test. Under the Committee's proposal, the possibility of obtaining this additional income will be considerably reduced because the Department will recover as much from the liable relative as, in its assessment, he can afford to pay. It will still be attractive to those supporting parents who consider that they can obtain substantial support from their former spouse to institute maintenance proceedings where the amount recovered is likely to be more than can be obtained from the Department of Social Security. In negotiating the financial arrangements on divorce or separation the

existence of this provision should be influential. Many liable relatives might prefer to reach an agreement as to maintenance, where they have the means, rather than exposing themselves to court proceedings instigated by the former spouse or the Department. This would have the desirable effect in the Committee's view, of discouraging collusive arrangements between separating couples to manipulate the public revenue.

5.32 A less desirable consequence, however, would be the loss of the additional income which many supporting parents get to top up their pension. It is considered that a way that the financial impact of this might be reduced would be to take the option suggested by the Department of Social Security, in its submission, of extending eligibility for class 'A' and class 'B' widows' pensions to all separated wives. The cost of doing this was estimated at approx.$20 million in a full year by the Department of Social Security. This would also have the statutory effect of removing the distinctions noted earlier between deserted wives, who have to satisfy the Department as to their status as such, and supporting parents, who do not have to satisfy the Department that they were deserted.[18]

Recommendation 24

5.33 *The Committee recommends that the Social Services Act be amended to extend eligibility for Class A and Class B widows' pensions to all separated wives rather than just to 'deserted wives' as at present. For statistical purposes the Committee believes it is desirable that a record be maintained of payments to separated wives and supporting parents as distinct from widows.* The Committee is aware that this would involve significant additional costs in relation to the extension of pensioner health benefits to all separated wives and to the extension of Class B widows pension to separated wives not currently eligible for assistance but considers that the additional expense would be warranted in savings that would result in the implementation of Recommendation 23.

5.34 The Committee is aware that the Department of Social Security believes that it would be inappropriate for it to adopt a role of enforcing obligations. The view was put to the Committee by officers of the Department. When asked for the Department's views on an enforcement role the officers replied:

> It is a very vexed question and one that a department associated with social security and social welfare normally tends to shrink from. To be seen by the public as an enforcer of maintenance orders detracts from your sympathetic or welfare image.[20]

The Committee appreciates the Department's concern in this regard but considers that it is the best placed Department to accept the responsibility of monitoring the outpayment of public funds to ensure that they go to recipients in genuine need.

5.35 It is our conclusion that if amendements along these lines were made to the Family Law Act the result would tend to advantage that most vulnerable group of people, deserted spouses supporting children. The present situation where people in these positions are required to take the initiative in ensuring their minimum support, would be removed and the State would ensure that those liable do not escape their responsibility. It would also discourage collusive arrangement.

5.36 It is the view of the Committee that the only amendment that would need to be made to s.75 (2) (f) if the Recommendation in para 5.30 were adopted, would be to direct the court to have consideration only to pensions that were actually being paid. We have also noted the comments in paras 128-130 of the Third Annual Report of the Family Law Council, where attention is drawn to the words 'under any law of

Australia or of a State or Territory', which occur in s.75 (2) (f). This has been interpreted to exclude overseas pensions from consideration. It is considered that problems can be overcome by deleting reference to laws of Australia or a State or Territory.

Recommendation 25

The Committee recommends that s.75 (2) (f) be amended to read: The eligibility of either party for a pension, allowance or benefit under any superannuation fund or scheme, or the rate of any such pension, allowance or benefit being paid to either party.

It should be noted that s.75 (2) (f) would then apply to situations where a pension is actually being received whether from social security, superannuation or other sources.

s.75 (2) (g):

- where the parties have separated or the marriage has been dissolved, a standard of living that in all the circumstances is reasonable.

5.37 Standard of living only becomes a relevant factor once the requirement of s.72, that the applicant has established a need, has been satisfied. The comparative standard of living of the applicant and the respondent is taken into account in determining what the respondent can reasonably afford to pay.

s.75 (2) (h):

- the extent to which payment of maintenance to a party would increase the earning capacity of that party by enabling him or her to undertake training or to establish a business with a view to obtaining adequate income.

s.75 (2) (j):

- to the extent to which the party whose maintenance is under consideration has contributed to the income earning capacity, property and financial resources of the other party.

s.75(2) (k):

- the duration of the marriage and the extent to which it has affected the earning capacity of the party whose maintenance is under consideration.

5.38 The provision tempered the arbitrary rule that had prevailed whereby the obligation to maintain a wife arose from her status as a wife; the duration of that marriage was of no significance. Under s.75(2) (k) the court can take proper account of economic dependence on the marriage in question.

s.75(2) (l):

- the need to protect the position of a woman who wishes only to continue her role as a wife and a mother.

5.39 It has been submitted that the provision does not go far enough to protect this class of woman because of the emphasis in s.72 on 'needs'. It is also apparent that the provision as it now stands in the legislation is not worded effectively. Recent court

decisions have limited the application of the provision by placing a narrow interpretation on the word 'role' requiring the applicant to wish to continue the roles of both wife and mother.

Recommendation 26

It is recommended that s.75(2) (l) would be more effective if amended to read: The need to protect the position and reasonable expectations of a party to a marriage who had contributed to the welfare of the family during the marriage and that, but for the dissolution of the marriage. such party would have continued so to contribute.

5.40 This would direct the court to consider the case of the middle aged woman who is left without a husband when she had looked forward to remaining essentially a housewife for the remainder of her life. It might be relevant to consider whether the loss of that expectation was due to her fault or his. In extreme cases, of course, the question could arise as to whether she has in fact contributed to the welfare of the family. The reference to expectations is intended to exclude the woman who only withdrew temporarily from the work force whilst the children were under school age, but had every expectation of eventually returning. This is clearly a different case which is taken care of by the other factors listed in s.75(2).

s.75(2) (m):

- if the party whose maintenance is under consideration is cohabiting with another person, the financial circumstances relating to the cohabitation.

5.41 The Committee is aware of difficulties that can arise where the respondent is cohabiting with another person who is in employment or in other respects receiving income. Where a person with whom the respondent is cohabiting is in a position to meet some of the financial needs of the respondent the Committee has been told that the circumstances may result in a larger order for maintenance against the respondent than if the personal resources of the respondent alone were considered. It was submitted in some private submissions that this can cause difficulty for a respondent in forming new relationships. It is the view of the Committee, however, that the overall financial position of the respondent should be considered when the decision as to what may reasonably be asked to contribute towards meeting the needs of the former family are under consideration.

s.75(2) (n):

- the terms of any order made or to be made under s.79 of the Act (Alteration of Property Interests) in relation to the property of the parties.

s.75(2) (o):

- any fact or circumstances which, in the opinion of the court, the justice of the case requires to be taken into account.

5.42 The Committee understands that s.75(2) (o) was originally inserted to enable a wider consideration of the merits of the case then was possible under the remaining provisions of s.75(2). In an early decision of the Family Court[21] it was said in relation to s.75(2) (o) that there were at least three possible interpretations of the provision:

> On the one side it may be said that the paragraph must be read in conjunction with the other thirteen paragraphs of subsection 2, all of which are basically of a financial nature . . . so as to be confined to facts and circumstances of an economic nature. This interpretation is consistent with the overall basic philosophy introduced into the legislation, namely to remove considerations of past conduct and fault from the determination of matters under the Act. However, it must be said that there are several areas within the Act where conduct is relevant, such as the provisions relating to custody and the power to issue injunctions contained in sec.114. The alternative view is that para (o) should be interpreted in accordance with the ordinary meaning of the words contained in it and that 'any fact or circumstances can and do include a consideration of conduct in a proper case; that is, that it opens the door to the reintroduction of fault as a relevant consideration in questions of maintenance and settlement of property.' The intermediate view and the one in substance put forward (in the case) was that although conduct generally was not relevant to maintenance nevertheless the court retained, through para (o), a power to refuse to make a maintenance order where the conduct relied on was 'outrageous' or 'gross' and was such that to make an order would offend even the most basic views as to maintenance.[22]

5.43 Accordingly the court adopted the third approach and refused to order that a husband pay maintenance to a wife in circumstances where her needs were established and he had the necessary means, but the custody of the children of the marriage had been awarded to the husband and the wife was pregnant to but had been abandoned by her lover. This view of the law was specifically refuted by the Full Court of the Family Court in a later case, it being held that the 'obvious and gross misconduct' test does not apply in relation to s.75(2) (o) and that facts and circumstances within s.75(2) (o) do not include those relating to the marital history of the parties such as the wife's nagging, beating him up occasionally, refusing him permission to use the car, banking his salary and other income and at the time of his leaving the home, her prevailing on him to transfer his interest in it to her for the sum of $1,000.00.[23]

5.44 It is the Committee's conclusion that there are circumstances in which it would be warranted for the court to take a wider view of the parties conduct. Accordingly it is recommended that the Family Law Act be amended to permit the court to look at factors other than those of financial conduct in determining whether maintenance should be payable and in relation to distribution of property under section 79.

Recommendation 27

5.45 *It is recommended that s.75(2) (o) be repealed and the following provision inserted:*

Any fact or circumstance, including any conduct of the applicant for maintenance towards the respondent and relevant to the matrimonial relationship, which, in the opinion of the Court, the justice of the case requires to be taken into account.

Child Maintenance

5.46 Section 73 provides that both parties to a marriage are liable, according to their respective financial resources, to maintain the children of the marriage who have not attained the age of 18 years. In determining whether to make an order for the maintenance of a child, or the duration or amount of such order, the court must take into account, in addition to the fourteen matters listed in section 75(2), the following matters:

- the income, earning capacity, property and other financial resources of the child (s.76(1) (c));
- the financial needs of the child (s.76(1) (d));
- the manner in which the child is being and in which the parties to the marriage expect the child to be, educated or trained (s.76(1) (e)).

5.47 Maintenance in respect of children cease when they attain 18 years of age unless the court is satisfied that maintenance is necessary to enable a child to complete his education, or because he is physically or mentally handicapped. It is no longer possible after the decision, in *Russell* v. *Russell*, for the court to make an order against a husband for the maintenance of a child who is not his natural or adopted child.[24] This adds further urgency to the Committee's recommendation that the Act be amended to reinsert the original definition of 'child of the marriage'.

Termination and Variation of Orders

5.48 A maintenance order in favour of a party to a marriage or a child ceases on the death of the person liable to make the payments under it, unless the order is expressed to continue for the life of the person in whose favour it was made or is made for a specific period which is not expired at the death of the person liable. In that case the order will be binding on the estate of the deceased (s.82(2) and (3)). A maintenance order in favour of a party to a marriage ceases on the re-marriage of that party unless the court otherwise orders (s.82(4)). Similarly, a maintenance order in favour of a child ceases on the marriage or adoption of that child unless the court otherwise orders (s.82(5)).

Variation of Orders

5.49 The court is given wide powers to discharge, suspend, revive, increase or otherwise vary orders already made. In making variations of orders the court must be satisfied that the circumstances of the payer or payee have changed, the cost of living as indicated by the Consumer Price Index (CPI) has changed or that material facts were withheld or false evidence given to the court making or varying the order in question. Given the cost, delays and inconvenience of making applications to vary orders, the Committee has considered whether all orders should be automatically subject to adjustment with rises in the C.P.I. See para 5.50. Section 80 gives the court extensive powers in relation to the orders it may make with regard to property and maintenance. It should be noted that under s.81 the court has a duty in all maintenance proceedings, other than those with respect to maintenance payable during the subsistence of a marriage, to make as far as practicable such orders as will finally determine the financial relationships between the parties.

C.P.I. Increases

5.50 Section 83(4) empowers the court to take into regard when varying orders for maintenance, variations that have occurred in the Consumer Price Index. Practitioners experienced in the field have observed that in practice, orders are defended by the respondent referring to increases that have occurred in his expenses, resulting in the need to review the financial position of all the parties. Frequently, in agreements which provide for maintenance, there are provisions that the order is to be varied each year by a simple arithmetic calculation from the CPI. Some judges include in their orders such a provision saying that the maintenance is to be varied annually on the anniversary of the order by reference to the CPI at a particular annual date.

5.51 The Committee has considered whether the legislation should provide for automatic adjustment of all orders made in line with increases in the C.P.I. It has concluded that such a provision is not desirable in the case of spouse maintenance if

for no other reason than that the impact of the C.P.I. is not uniform in relation to all wage and salary earners and does not apply at all in relation to the self employed. It would be necessary to provide that parties might lodge objections to automatic adjustment which could increase the requirement of parties to appear in court. It is noted that the courts can make orders providing for automatic adjustment in appropriate cases. However, it is considered that these objections do not apply to the case of child maintenance. The cost of keeping a child can be standardised and adjusted at regular intervals.

Recommendation 28

5.52 *However, it is recommended that the regulations prescribe the various amounts payable in respect of children's maintenance using criteria supplied by the Commonwealth Statistician. Furthermore, the Committee recommends that the amount payable to children should be subject to automatic adjustment. Accordingly it is recommended that the Commonwealth Statistician regularly determine variations in the amount based on the relative cost of bringing up children.*

Maintenance Agreements

5.53 A 'Maintenance Agreement' is defined by s.4 of the Act as a written agreement between the parties to a marriage making provision for financial matters.

5.54 Part VIII of the Act then provides for 2 types of Maintenance Agreements;

- A maintenance agreement which does not provide that it is to operate in substitution for the maintenance and property rights of the parties under the Act.
- A maintenance agreement which does provide that it is to operate in substitution for the maintenance and property rights of the parties under the Act.

5.55 An agreement expressed to operate in substitution for rights is ineffective unless it has the approval of the court. The agreement supplants any orders made in approving the agreement and the court has to consider whether the arrangements made are proper arrangements. An amendment to s.87(6) made by Act no. 23 of 1979 makes it clear that the court's approval under s.87 is tantamount to orders of the court. Approval can only be revoked where the court is satisfied of fraud, undue influence or, by agreement of the parties.

5.56 Agreements in substitution of rights have become the most common way of settling financial matters following the break up of a marriage.[25] The approval of such an agreement by a court precludes any further consideration by the Family Court of the parties' matrimonial property rights. Considerable concern has been expressed concerning the implication of magistrates' courts approving such agreements.[26] This problem could be alleviated if reg. 169 were to require that each party to an agreement which it is proposed be registered under s.87 were to certify that he/she had been independently advised as to the legal consequences of registering the agreement under s.87.

5.57 Under s.44(3) and (4) except by leave of the court proceedings for maintenance may not be instituted after the expiration of 12 months after the making of a *decree nisi* except with the leave of the court. The court shall not grant leave unless it is satisfied that hardship would be caused to a party or a child of the marriage. This limitation does not however apply to proceedings for the maintenance of a child or to proceedings seeking a variation of a previous maintenance order.

Tax Deductibility of Maintenance

5.58 At various times it has been proposed that maintenance payable to a former wife should be an allowable deduction from the assessable income of the person making the payment. At present the reverse is the position and the payment is not taxable in the hands of the recipient. The advantage of the payment being tax deductible would be an inducement to parties to pay maintenance and might correspondingly result in some improvement in the rate of default. The Committee obtained advice from the Treasurer on the financial implications of such a change in the taxation law. This was to the effect that the impact on revenue collected could not be adequately assessed on the basis of existing data. If such a change were made it would mean that payments would be taxable in the hands of the recipient. We have no data on the effect that this would have, nor have groups representing women made submissions on the matter. It is noted that the change was recommended by the Asprey Committee.[27] The proposal is also mentioned in the Third Annual Report of the Family Law Council.[28] The Council considers that the matter should be considered as part of the whole problem of family taxation. We are inclined to agree with this conclusion.

Recommendation 29

5.59 *It is recommended that the Treasurer refer the matter of the tax deductibility of maintenance for consideration by an inter-departmental committee after canvassing the views of organisations interested in the matter and to have regard to the effect of such a proposal on the ability to pay maintenance.*

Collection and Enforcement of Maintenance

5.60 The Family Law Act provides a uniform set of principles for determining entitlement and rules as to enforcement. The administration of the system however, is dependent on arrangements with the States for collection and the use of State courts of summary jurisdiction for enforcement of orders. These arrangements perpetuate to some extent, the situation that applied before the Family Law Act was introduced. In New South Wales, Victoria and Queensland, Tasmania and the Commonwealth territories, the procedures which apply as regards collection and enforcement are similar to and are administered by the same officials that administered (and continue to administer) the old Maintenance Acts. In South Australia and Western Australia more streamlined procedures have been introduced which will be described below.

5.61 It needs to be emphasised that the maintenance jurisdiction caters to a degree for a different population to those seeking other relief through the Family Court. An important social change reflected in section 79 of the Act is the concept that the right to participate in the sharing of the family assets is an entitlement to share in the financial fruits of the marriage. It is no longer merely an object of the obligations of a husband to support a discarded wife. The need for support will arise less often therefore where the parties have substantial assets from which the needs of both the separating spouses can be met. Those requiring periodic maintenance, however, tend to be drawn from that section of society with small or limited means and few substantial assets. It is the same population that requires support through the social security system upon family breakdown.

5.62 In New South Wales under State maintenance laws the Department of Youth and Community Services acted as collector but ceased to do so once the Family Law Act came into force in 1976. Almost all enforcement action is brought in courts of

petty sessions. Not all courts deal with family matters and particular courts tend to specialise. For the eastern and near southern suburbs of Sydney the Metropolitan Children's Court is the court of most frequent recourse. Proceedings are instituted and prosecuted by the clerk or deputy clerk of court upon request, who receives and registers the relevant documents, issues the summons, and examines the respondent as to means. Upon being satisfied by the clerk as to the respondent's ability to pay, the presiding magistrate makes orders under the Family Law Act regulations which are served by the Court Bailiff. It is within the discretion of the clerk of the court whether to assist payee's seeking enforcement of order.

5.63 Enforcement procedures in Victoria are similar to those in force in New South Wales. In his submission to the Inquiry the Attorney-General for the State of Victoria reported that the arrangements were satisfactory but commented:

> I am concerned that there is a period of approximately six weeks delay between the day of making an order in the Family Court and the date specified in the summons for arrears of maintenance in the Magistrates' Court. This delay can cause financial embarrassment to a needy applicant, especially in cases where the party's Social Security entitlement has been reduced on the basis that maintenance payment will be made.
>
> This situation is ameliorated to some extent by the fact that such applicants are financially assisted from the Poor Boxes held at various Magistrates' Courts. However, this cannot provide a total solution.

5.64 In the Australian Capital Territory all proceedings are instituted and prosecuted by the Collector of Maintenance (clerk to the court) or by the Assistant Collector. All service of process and execution is carried out by bailiffs of the magistrate's court (i.e. Australian Federal Police). When the payer fails to pay and is brought before the court by summons, he is examined by the Collector, who obtains the necessary orders for enforcement. Consideration may be given to transferring this jurisdiction to the Family Court of Australia. (There is a working party presently examining this possibility). In no cases are payers under maintenance orders made to pay anything towards enforcement. Similarly in Tasmania the Public Service clerks of courts register the maintenance order and serve the summons. They examine the payer and subsequently obtain the necessary orders from the magistrate to enforce payment. All service of documents, process and all execution is performed by the police. In no cases must the payee pay for the services rendered.

5.65 In Queensland upon receipt of the necessary papers the Registrar (clerk of the court) registers the order and issues to the payer a summons which is served by the bailiff. When the payer appears in court, the Registrar examines him as to his means. If the magistrate is satisfied that the payer can pay, the Registrar obtains the necessary orders which are later served by the bailiff. The payee is not required to attend enforcement proceedings generally, but arrangements are made for payees to attend where the circumstances suggest it to be desirable.

5.66 In the Northern Territory with respect to all orders, whether originating from overseas, interstate or the Territory itself, service and execution is done by court appointed bailiffs who can be Australian Federal Police, N.T. Police or court staff so appointed. In Darwin the payer is either examined by the deputy collector of maintenance, Darwin, or the magistrates. In other areas the payer is either examined by the magistrates or the clerks of the court who are also deputy collectors of maintenance. All services are provided free of charge to the payee under the order. The payee is not required to attend the proceedings. The biggest problem encountered is locating the payer. The Northern Territory has a large transient population and, as there are no facilities to conduct inquiries concerning the payer's whereabouts, the

payee must be able to give an address for the payer. The Commonwealth meets the cost of collection and enforcement under the maintenance provisions of the Family Law Act in all States and Territories.

5.67 In all of these jurisdictions, whilst the service is free to maintenance applicants, the procedures are cumbersome, slow and ineffective against a respondent determined to resist the obligations to pay maintenance. Where an order is not complied with the onus is on the applicant to proceed to enforce the order. This will involve a further round of service of process, court appearances and further orders. Arrears of maintenance are rarely recoverable as the respondents usually lack either the means or the assets. Courts are reluctant to make orders that will be futile. Two States have, however, taken steps to streamline the system of maintenance collection.

5.68 In the Western Australian Family Court, an officer has been appointed called the Collector of Maintenance. The Collector is appointed pursuant to regulation 16 of the Family Court of Western Australia regulations. He is empowered to receive moneys payable to him or to the court and disburse those moneys to the person named in the order and enforce an order at the request of a person entitled to receive moneys in accordance with the enforcement provision of the Family Law Act. Regulation 197 gives the Collector a discretion whether to act on behalf of a payee or not. By providing that the person making the application shall have the same liability for all costs in enforcement proceedings, the Collector may refuse to act. The Collector is empowered to apply a means test laid down by the Under Secretary of Law. People entitled to have the Collector act for them are recipients of social security benefits, those in a 'lower income bracket who could not reasonably be expected to afford a solicitor or reside at a distance from the court'. When the Collector decides that the applicant can afford to seek the assistance of a solicitor the person is directed to seek this assistance. The Collector will not take proceedings for seizure or the sequestration of estates. The Collector of Maintenance represents an improvement on the dependence on ineffective, antiquated procedures in courts of summary jurisdiction. But it reinforces a legalistic and court based approach to the provisions of support on marriage breakdown.

5.69 In South Australia, however, an attempt has been made to integrate the collection and enforcement of maintenance with the provision of emergency support to supporting parents. The Department for Community Welfare (SA) provides a free legal service to separated husbands and wives seeking assistance or advice on matrimonial problems and maintenance. The Department will take the initial instructions and assist in the negotiation of maintenance aggrements. Negotiated agreements can then be registered pursuant to s.86 and regulation 169 of the Family Law Act. It is considered a great strength of the South Australian procedures that assistance is provided at an early stage when an attempt is made to bring the parties together to negotiate. The range of services that such a Department can provide means that assistance can be provided in other areas of the relationship. Where agreement cannot be reached, the Department will assist the client to prepare and present an application to the Family Court or magistrate. Departmental officers will appear in court on behalf of clients in enforcement proceedings. In such cases a Departmental officer will act for the client as an assistant collector of maintenance. The Department because of its regional arrangements is able to provide a State wide service to clients in matrimonial cases. In South Australia it is usual for a maintenance order made by a court to direct that payment be made to the Director of Maintenance. The Department provides a service of paying the maintenance to the payee. Not only does this mean that the Department has a complete record of the maintenance account in question but

it enables the most appropriate action to be taken where a complaint is received that payments are in arrears. The Commonwealth re-imburses the State of South Australia for the cost of running the maintenance collection operation under the Family Law Act.

5.70 The advantage of such a system as this is that the need for court appearance is reduced to a minimum. The Departmental Officers can act as go-betweens so that where default occurs they can establish contact with the defaulter and assist the parties to re-negotiate agreements. A system based on the South Australian model, however, provides the opportunity for the parties, through the good officers of the Department, to negotiate a settlement. It is considered that this will produce more realistic arrangements and consequently, diminish the necessity for court based enforcement action to take place. We see advantages in such a system being administered by a State Welfare Department which can direct the parties to other services which may assist in the resolution of disputes, in relation to the custody of children.

5.71 If State departments were to remain responsible for the payment of interim benefits it would be expedient for the Commonwealth to fund all States to provide a service along the lines of that operating in South Australia. It is understood that from the end of the financial year, South Australia will cease to be a party to the agreement with the Commonwealth whereby the States pay interim benefits during the first six months to supporting parents. Victoria has already opted out of the arrangement and other States are expected to follow. It looks likely that the Commonwealth, through the Department of Social Security will become directly responsible for these payments. In such circumstances it would be more appropriate for the Department of Social Security to manage the collection and enforcement services we envisage. In a discussion paper released by the Family Law Council it was proposed:

- That a separate maintenance enforcement bureau be established and attached, either to the Family Court, the Department of Social Security or to a State department. Such a bureau should be modelled on the South Australian and Western Australian systems. It would comprise two basic features:
  - a service to negotiate agreements between parties, to act on behalf of an application in Court proceedings to secure orders and to initiate enforcement action where the order is in arrears;
  - a centralised computerised recording system for all maintenance orders, along the lines of the Western Australian system operated by the Collector of Maintenance. Such a system would undoubtedly reduce the administrative costs involved in keeping records and would lead to more efficient enforcement mechanisms.

The Committee concludes that these suggestions have merit and accordingly recommends that:

Recommendation 30

5.72 *It is recommended that the Government review the arrangements for the collection and enforcement of maintenance with a view to establishing a consistent administrative approach. An agency should be created modelled on the systems developed by the Department of Community Services in South Australia and the Collector of Maintenance in Western Australia. In view of the withdrawal of some States and the prospective withdrawal of other States from the responsibility of providing grants under the States Grants (Deserted Wives) Act, it is considered that this agency should be established in and administered by the Department of Social Security in close liaison with the Family Court and courts of summary jurisdiction under the Family Law Act.*

Enforcement

5.73 The effectiveness of court ordered maintenance very largely depends on the ability of those receiving maintenance to enforce orders made in their favour. The following methods of enforcement are prescribed in the regulations:

- order for payment of arrears;
- garnishment;
- seizure of property;
- sequestration of estate.

5.74 In addition, under regulation 169, two methods of obtaining information are prescribed. The registrar (or authorised person such as a clerk of petty sessions) can issue and sign a form 29 requesting a person bound by an order to supply financial information. But there is no sanction available if the recipient refuses to comply. Form 29A summonses a defaulter to attend for oral examination. It will be issued where the registrar is satisfied that a maintenance order has not been complied with for two weeks. This means the registrar (or his equivalent) has a discretion whether to issue the summons or not. A penalty of $500 for non-compliance is applicable. However, enforcement of a fine would be futile in the majority of maintenance cases. It is the consensus of opinion that the procedures for bringing maintenance defaulters before the court and for establishing capacity to pay are inadequate and ineffective. It is noted later that a procedure should be available to ensure complete review of the order as soon as default occurs. The regulations also provide for the court to issue a warrant of commitment as the next step in the process to bring a defaulter before the court for the process of examination. These procedures are very similar to those that apply generally in the collection of petty debts, but are considered to be less effective.

5.75 The court may order payment of arrears under the original order. It has flexibility to direct payment of the whole or of a portion of arrears under the original order and the mode of payment whether by lump sum or instalments. The Committee was told that in practice, courts rarely ordered payment of accumulated arrears. This approach was seen as an inducement to respondents to such orders not to comply, as any order made by the court would be for a lesser amount. The respondent might also apply for a variation of the original order as a delaying tactic.

5.76 Garnishment of wages can be ordered by the court. This can be an effective method of enforcement but is only available where the respondent is in regular paid employment. The possibility of employers discriminating against respondents was also mentioned to the Committee as a disadvantage of the procedure. The order cannot be obtained until default has occurred. Where the respondent has property, the beneficiary can apply for seizure and sale of personal property. Clearly, substantial property is less likely to be involved where default occurs in the payment of an order for periodic maintenance. The other remedy available against property, particularly where a respondent is self employed is sequestration. This process, which is akin to proceedings in insolvency, enables the enforcing authority to manage the assets of a respondent until outstanding commitments have been met. Sequestration does not appear to be an effective remedy at present. It only applied where the defaulter carried on a business. It is difficult to find people to act as sequestrators. The sequestrator has limited powers and the respondent can sometimes freeze or remove assets from the sequestrator's control. It should also be noted that under the law as it is now a maintenance order cannot found proceedings in bankruptcy.[29] Until recently a debt resulting from a maintenance order cannot be proved in a bankrupt estate.[30]

5.77 The other possible remedy for maintenance default is imprisonment. Although imprisonment for maintenance default was abolished by s.107 of the Family Law Act, the possibility of imprisonment for contempt of an order of the court under s.108 still exists. The matter is not entirely free from doubt as there is a legal argument that has yet to be determined that s.107 overrides s.108 by necessary intendment.

Effectiveness of Procedures

5.78 Such statistics as are available suggest a very high incidence of default. Reference is made in the Report of the Commission of Inquiry into Poverty in Australia, to studies undertaken in 1972 in Victorian magistrates' courts, which indicated that after one year of duration only 30 per cent of maintenance orders would continue to be paid while after two years virtually none would be paid. These findings are re-enforced by available statistics from Canada and the United Kingdom.

5.79 In this connection attention is directed to chapter 5 of the Report of the Commission of Inquiry into Law and Poverty,[31] where recommendations are made as to the reform of debt collection and judgment enforcement procedures, generally, in Australia. An observation made in the Report was:

> Probably the major deficiency in the examination procedure in all three States is the inadequacy of the inquiries made into the debtors financial position. A system which bases orders on anything less than a full understanding of the debtor's financial means and obligations ultimately will benefit neither debtor nor creditor. It is disturbing that in the large majority of cases there is inadequate inquiry into the debtor's means by the creditor and the Court.

The Poverty Report noted that observations in Melbourne[32] and Adelaide had shown that the average time for a court hearing in a debt collection matter was three minutes. The onus was largely placed on the debtor to determine what he could afford. This led the Inquiry to conclude that administrative reforms are necessary to ensure that the examination hearing is properly conducted as a full inquiry into the debtor's financial affairs.

5.80 The Family Law Council in a discussion paper on maintenance enforcement reached the same conclusion:

> It appears that a considerable amount of maintenance default springs from the failure of one or both parties to provide the Court with adequate information about their current financial position. For this reason a system has been proposed under which default by the payer would necessitate a review of the original order and/or examination of the defaulter's present financial situation. To do this the payee would have to appear in court to hear the evidence and either accept or reject the new proposal. A disadvantage of this approach would be the volume of court work generated, unless of course, registrars or court assessors could perform this work.[33]

The conclusion led the Family Law Council to make recommendations that would ensure the attendance of both parties in maintenance proceedings; improvements to the court structure and particularly the segregation of maintenance work into separate court sessions; the use of 'specialist' magistrates within the Family Court structure and, in the meantime, training programs for existing magistrates; and the availability of credit counselling facilities which might include court initiated conciliations to assist parties in reaching agreements. The Council also made recommendations which we have noted earlier for the establishment of a special agency or enforcement bureau and recommendations for the technical improvement of the Act.[34]

5.81 It was a firm conclusion of the Poverty Commission's investigation of debt collection procedures that most were ineffective and that wherever possible debts should be recovered by the deduction of instalment from income. The Poverty Inquiry came down firmly against imprisonment for debt except where the debtor's conduct amounted to a 'wilful refusal to participate in the procedures of the court'. A similar conclusion was reached by the Family Law Council in its discussion paper. The Council observed:

> It seems that sending maintenance defaulters to prison is an essay in economic and social futility as far as the taxpayer is concerned. The defaulter has to be kept in prison where his future earning power is reduced, the wife and family upon whose maintenance he has defaulted fall upon social security benefits, as do his second wife, or mistress and children. This might be a justifiable social cost if the result were to inculcate or to strengthen among the population at large a disposition to maintain their dependants. Unfortunately there is no empirical evidence to assist the arguments either way. However, observations have been made that the threat of imprisonment can be effective in extracting maintenance from those defaulters who are unwilling to pay, but not quite ready to go to prison for their disinclination.
>
> While it has been appropriate that s.107 of the Family Law Act displaced state maintenance laws under which husbands could be incarcerated summarily on failure to answer a default summons, 'the effect of s.107 has been to cast doubt on whether the Court can actually order imprisonment under s.108 for contempt constituted by wilful disobedience of maintenance orders'. The doubt as to the existence of this power appears to encourage some payers to ignore the Court's orders, secure in the knowledge that the Court has no real powers to enforce its order, except by financial orders. The imposition of a fine or a recognisance does not have the same deterrent effect as an order which can lead to imprisonment. To overcome this difficulty it should be made clear that the contempt power under s.108 enables the court to imprison a maintenance defaulter who has wilfully refused to comply with the order at a time when he had the means to pay. This could be done either by amending or repealing s.107. It is not envisaged that the power of imprisonment would need to be used often, and certainly not where the person had no means available. The existence of the power may be enough to encourage compliance with the Court's order.

5.82 It is concluded that the operation of the system of Maintenance collection and enforcement could be greatly improved if a number of procedural changes and administrative reforms were instituted. Together with the recommendations made earlier in the chapter for amendments to clarify the operation of the Maintenance provisions of the Act and the administration of Social Security the following recommendation is made:

Recommendation 31

5.83 That procedures for enforcement of Maintenance should be improved and in particular *it is recommended:*

(a) *that maintenance proceedings be undertaken by specialist Family Court magistrates in designated courts specialising in family law work (see further chapter 8);*

(b) *that the regulations be amended to ensure the attendance, wherever possible, of both parties when maintenance matters are dealt with in the court;*

(c) *that the regulations be amended to ensure that upon default by a respondent to a maintenance order the order is reviewed by the court, or the defaulter examined as to his means, to ensure that the order reflects the capacity of the defaulter to pay;*

(d) *that steps be taken to improve the capacity of courts of summary jurisdiction exercising jurisdiction under the Act to perform these functions adequately. The Committee makes specific recommendations in this regard in chapters 8 and 10;*

(e) *that the agency established in accordance with recommendation 30 be equipped to provide credit counselling facilities and conciliation services to assist parties involved in maintenance proceedings;*

(f) *that section 40(3) of the Bankruptcy Act be amended by the addition of a further sub paragraph to deem a maintenance order to be a final order for the purpose of founding procedures in bankruptcy;*

(g) *section 108(1) of the Family Law Act sould be amended to read: Notwithstanding any other provisions of law . . . including section 107 of this Act, a court having jurisdiction under this Act may punish persons for contempt in the face of the court. This will place beyond doubt the court's power to imprison for contempt in the face of the court in proceedings relating to maintenance;*

(h) *amendment to the Family Law Act to effect those technical proposals for amendment to the Act and regulations proposed by the Family Law Council in its Working Paper (No. 4) on the Enforcement of Maintenance, namely: Amendment of regulations 136, 139(4), 144 and 145 to enable the Collector, Deputy Collector or Assistant Collector of Maintenance in South Australia and Western Australia to apply for sequestration (reg. 136) and to transfer an order interstate. At present these functions can be performed only by registrars or by the clerk of the court;*

(i) *the inclusion of a provision to issue a warrant in the first instance where an application is lodged under regulation 133(2) but the whereabouts of the payer is unknown;*

(j) *amendment of regulation 133 to authorise withdrawal of a warrant;*

(k) *amendment of the provisions relating to sequestration by including the power to sell specific real estate. Alternatively, amending the enforcement regulations to empower the court to make an order for the sale of a particular item of the respondent's real property in satisfaction of an unsatisfied order;*

(l) *amendment to the Act to permit the registration of lump sum maintenance orders in State courts and to permit the enforcement of such orders in State courts (c.f. s.104(1) of the Matrimonial Causes Act 1959).*

Property

5.84 Since the enactment of the various Married Women's Property Acts by the Australian colonies at the end of the last century, the system of matrimonial property law prevailing in Australia has been one of separation of property. Under this system each party to a marriage retains separately, not only the property that he or she owned before marriage, but also that property which each acquires in his or her own right during the marriage, and each party has the power to dispose of his or her own separate property. Our system of separation of property between husband and wife is to be contrasted with various systems of community of ownership of assets between husband and wife which exist in certain other countries and which will be referred to later in this chapter.

5.85 When the Commonwealth enacted its *Matrimonial Causes Act* 1959, it gave the divorce court a new and wide power to adjust property interests between spouses. Up

until that time the court's power to make orders with respect to the property of a divorcing couple was generally limited to property that had been the subject of a marriage settlement. However the Matrimonial Causes Act (s.86) gave the court the power to order that on the breakup of a marriage the parties to the marriage or either of them, make for the benefit of either or both parties or of their children such settlement of property to which either or both was entitled, as the court considered just and equitable in the circumstances of the case.

5.86 Similarly the Family Law Act (s.79) conferred wide powers on the court to alter the property interests of the parties to a marriage. Section 79 (1) of the Family Law Act provides that in proceedings with respect to the property of the parties to a marriage or either of them the court may make such order as it thinks fit altering the interests of the parties in the property including an order requiring either or both parties to make such settlement or transfer of property as the court determines for the benefit of either or both parties or for a child of the marriage. However, the court must not make a s.79 order unless it is satisfied that in all circumstances it is just and equitable to make the order, (s.79 (2)) and in making the order it must take into account:

- the financial contribution made directly or indirectly by or on behalf of a party or a child to the acquistion, conservation and improvement of the property (s.79 (s.79 (4) (a));
- the contribution made directly or indirectly to the acquisition, conservation and improvement of the property by either party including any contribution made in the capacity of homemaker or parent (s.79 (4) (b));
- the effect of any proposed order upon the earning capacity of either party (s.79 (4) (c));
- matters referred to in s.75 (2) of the Act so far as they are relevant (that is, the matters that are to be taken into account in making a maintenance order under the Act) (s.79 (4) (d));
- any other order made under the Act affecting a party (s.79 (4) (e)).

5.87 It is to be noted that neither the Family Law Act nor its predecessor, the Matrimonial Causes Act, has attempted to give either party to a marriage an automatic interest in the other's property either during the marriage or upon its breakdown. Both Acts have simply given a discretionary power to the court to alter the property interests of the parties to reflect more accurately the contribution, direct and indirect, of the parties to the acquisition and maintenance of the property. It has been put to the Committee that a discretionary power in the court to alter property interests of spouses upon divorce is not sufficient and that what is needed is a clear legislative declaration of the property rights of spouses both during and on the termination of marriage. Such a legislative declaration would of course amount to the introduction of a formal matrimonial property regime for this country. Before examining the suggestion that a matrimonial property regime replace our present system of the discretionary adjustment upon divorce of the otherwise separate property interests of spouses, we propose to examine certain specific difficulties that have come to our attention concerning the operation of the present provisions of the Family Law Act relating to property settlements between spouses.

Variation of Property Orders

5.88 A substantial number of submissions[35] received by the Committee have drawn attention to the difficulties and indeed injustices, that can arise because of the very

limited provision in the Family Law Act for the variation of property orders made under that Act or under the repealed Matrimonial Causes Act. All of these submissions have recommended some expansion of the present powers to vary property orders.

5.89 Under the Matrimonial Causes Act[36] the courts had power to discharge or revoke a property settlement or maintenance order if the party in whose favour it was made married again or if there was any other just cause for so doing; the words 'any other just cause for so doing' included events or circumstances occurring either before or after the making of the order in question.[37] There was also power under the repealed Act to modify, suspend, revive or vary a property or maintenance order.[38]

5.90 While the Family Law Act contains extensive powers[39] for the discharge, suspension, revival, decrease or increase of maintenance orders, it originally contained no power at all to vary orders which alter property interests, that is orders made under s.79 of the Act. That the architects of the Family Law Act intended this clear distinction in the matter of variation between maintenance and property orders has been indicated by Mr Justice Murphy in the following passage from a recent judgment:

> The difference in legislative treatment of property and maintenance orders is due to strong policy considerations in not reopening property orders after time for appeal has elapsed.[40]

5.91 With reference to this policy in favour of the finality of property orders, it is important to note s.81 of the Family Law Act which imposes a duty on the court to make as far as practicable, orders that will finally determine the financial relations between the parties. This duty applies not only in property proceedings, but also in post-divorce maintenance proceedings.

5.92 Despite the policy considerations favouring the finality of property orders, a limited power to vary property orders was introduced in the form of s.79A by the Family Law Amendment Act (no. 63) of 1976. In its original form s.79A gave the court a discretion to set aside an order altering property interests made under s.79 and to make a substitute order under s.79 only where the court was satisfied that the original order was obtained, by fraud, by duress, by the giving of false evidence or by the suppression of evidence.

5.93 However, there was criticism[41] of the very limited circumstances in which the original s.79A permitted a variation of a property order, and as a result s.79A was amended by the *Family Law Amendment Act* 1979 to broaden its application to allow the setting aside of a s.79 order where:

> there has been a miscarriage of justice by reason of fraud, duress, suppression of evidence, the giving of false evidence or any other circumstance.

5.94 By the introduction of s.79A in 1976 and its subsequent amendment in 1979, the position has been reached that an order altering property interests can be varied under the Family Law Act, but only where it was unjustly obtained; there is no provision for alteration on account of changes in the circumstances of the parties after the making of the order. The following situations have been drawn to the Committee's attention as examples of cases in which after the making of a property order, the circumstances of the parties change sufficiently to warrant a variation of the property order:

- An order is made giving the parent who has custody of the children the occupancy of the home; subsequently the children move to live with the other parent; at present the order for occupancy cannot be varied[42] (an order for occupancy of the home having been held to be an order relating to property)[43];
- A husband is ordered to transfer the home to his wife, partly in recognition of her past contribution to the home and family, and partly to provide

accommodation for herself and the children; if soon after the wife remarries a man with assets, there is nothing that can be done under the present provisions of the Act to enable the first husband to recoup some of his interest in the former home.[44]

5.95 Particular difficulties exist and have been drawn to the Committee's attention in relation to property orders made under the Martimonial Causes Act. It will be recalled from what has been said above, that under the repealed Act it was possible to vary a property order if the party in whose favour it was made married again or if some other subsequent event provided just cause for a variation. After some initial uncertainty it has now been established that property orders made under the Matrimonial Causes Act are to be treated as orders made under s.79 of the Family Law Act and accordingly can only be varied under s.79A in the circumstances allowed by s.79A.[45] This of course means that the circumstances in which a property order made under the repealed Act can be varied, are now considerably more limited than those circumstances under which the order could have been set aside when it was originally made.

5.96 It is the Committee's conclusion that there ought to be a wide discretion in the court to set aside property orders made under both the Family Law Act and the Matrimonial Causes Act, not only in cases where the order was unjustly obtained but also where there has been a substantial change in the circumstances of one or both of the parties after the making of the order. In order to restrict the number of applications for variation of a property order that might be brought, it would be necessary to provide that such variation proceedings could only be brought with the leave of the court. It would also be necessary to provide that a court should not grant leave for the institution of variation proceedings unless it is satisfied that hardship would be caused to a party to the marriage or to a child of the marriage if leave was not granted.

5.97 With regard to the possible objection that the introduction of a wider right to vary property orders will lead to a substantial increase in litigation, the Committee notes that the Family Law Advisory Committee of the Law Council of Australia stated in its submission to the Committee that there was very little litigation of this kind under the Matrimonial Causes Act where leave was not required. It will be the Committee's recommendation that leave should be required to institute proceedings under the Family Law Act to vary a property order.

Recommendation 32

5.98 *The Committee therefore recommends that s.79A of the Family Law Act be repealed and that a new section be inserted in its stead to provide:*

- *that on the application of a person affected by an order made under s.79 of the Family Law Act or s.86 of the Matrimonial Causes Act, the court may if it is satisfied that there is just cause for so doing, set aside that order, and if it thinks fit make another order under and subject to the terms of s.79 of the Act in substitution for the order so set aside;*
- *that in the exercise of this power to set aside an order made under s.79 of the Family Law Act or s.86 of the Matrimonial Causes Act the court shall have regard to the interests of, and shall make any order proper for the protection of, a bona fide purchaser or other person interested;*
- *that proceedings for the setting aside of an order made under s.79 of the Family Law Act or s.86 of the Matrimonial Causes Act shall not be instituted until leave has been obtained from the court in which the proceedings are to be instituted;*

- *that the court shall not grant such leave unless it is satisfied that hardship would be caused to a party to a marriage or to a child of the marriage if leave were not granted.*

Superannuation

5.99 The Committee is aware that superannuation entitlements are causing some difficulty in property proceedings under s.79 of the Family Law Act.[46]

5.100 The difficulty arises when one of the parties to a divorce has been a contributor to a superannuation scheme for a substantial period of the marriage and the other party claims an interest in the superannuation benefit to which the contributor will become entitled on retirement. For the court to make an order altering interests in property under s.79 of the Act it is necessary that any asset which is to be the subject of the order, comes within the Act's definition of 'property'. The existing definition of 'property' contained in s.4 of the Act is: property to which a party is entitled either in possession or reversion. Whether a particular superannuation benefit comes within this definition of property will depend on the provision of the deed or legislation establishing the superannuation scheme in question. In most schemes the benefit will be subject to certain defined future events; threfore there will be no present entitlement in the contributor and so the benefit will not be 'property' within the meaning of the Act. Not being 'property', the benefit cannot be the subject of a direct order in s.79 proceedings.

5.101 Nevertheless the Family Court has recognised that superannuation benefits are an important factor to be taken into account in adjusting property rights between divorcing spouses. This is because:

> Contribution by one spouse to superannuation usually means the loss of moneys available for the current support of the family in order to provide security for both spouses on the retirement of the contributing spouse. Loss of the right to share in the superannuation by a divorced non-superannuated spouse is an important financial consequence of the dissolution of the marriage.[47]

5.102 It would seem that in most of the cases decided so far[48] the courts have taken the anticipated superannuation benefit into account by making a more favourable allocation of property than otherwise would have been the case to the non-superannuated spouse in an attempt to compensate that party for the loss of future benefit through the divorce. The problem with this approach is that it is only available where there is other property.

5.103 In cases where there has been little or no other property available for distribution between the spouses and the superannuated spouse will be eligible to receive benefits within a few years from the time of the application, the courts have adjourned the application until the benefits become payable.[49] The difficulties with this course are first, that it runs contrary to the general direction given to the courts in s.81 of the Act to make orders in property proceedings that will as far as practicable terminate the financial relationships between a divorcing couple. Second, it is clearly only a satisfactory solution where the superannuation entitlement is likely to vest within a relatively short time in the future. Third, the death of the contributor may intervene before the final determination of the application, in which event the benefit will not, at least under most superannuation schemes fall into the contributor's estate but rather pass directly to his dependants.

5.104 The Family Law Council has made available to this Committee a paper entitled *Superannuation and Family Law* prepared recently at the Council's request by

a working party headed by Mr Justice Emery. As an 'immediate but partial' solution to the problems posed by superannuation benefits in the adjustment of property interests between divorcing spouses, the working party's paper recommends an amendment to the Family Law Act to give the court a discretion to defer the making of a final order in property proceedings until the superannuation benefits become payable.

5.105 However, the working party recognises that there will always be a risk if proceedings are deferred that the contributor may die before the superannuation benefits become payable. Only in rare cases will the benefit then be payable to the estate of the contributor. In almost all current superannuation schemes when a contributor dies before the benefits are payable, the benefits will be paid directly to his dependants. But a divorced spouse is generally never included as a potential dependant in current superannuation schemes.

5.106 To assist the divorced spouse in those rare cases in which superannuation benefits do fall into the estate of the deceased contributor, Mr Justice Emery's working party has recommended a further amendment to the Family Law Act to provide that a pending claim for a property settlement or for maintenance shall not abate by reason of the death of the spouse against whom the claim is made.

5.107 However with regard to the more common case in which on the death of a contributor his superannuation benefits pass directly to a specified class of dependants, which class never includes a divorced spouse, the working party recognises in its paper that these problems cannot be solved simply by amendments to the Family Law Act. Rather its solution will require extensive changes in Commonwealth policy and in taxation and superannuation legislation and State legislation.

5.108 For its part the Committee recognises the increasing significance of superannuation as a family asset and the consequent necessity for the fair and proper treatment of the asset in the adjustment of property rights between divorcing spouses. Accordingly the Committee supports and recommends the acceptance of the amendments to the Family Law Act proposed by Mr Justice Emery's working party, to facilitate the deferment of final orders in property proceedings until the superannuation benefit has been received. The Committee also supports and recommends the further amendment to the Act proposed by the working party to permit property and maintenance actions to proceed despite the death of the respondent spouse.

Recommendation 33

5.109 *That the Family Law Act be amended to give a discretionary power to the court to defer the making of a final order in property proceedings until superannuation benefits have been received, and where necessary to make an interim order.*

Recommendation 34

5.110 *That the Family Law Act be amended to prevent the abatement of a maintenance or property application on the death of the respondent.*

5.111 The Committee also considers that the amendment to the Act that we have recommended as recommendation 32 that is the amendment to provide for a wider power to vary property orders — should be of some assistance in solving the problems of the just sharing of superannuation entitlements between divorced spouses where those entitlements become payable during the life of the contributor.

5.112 It is recognised however that these recommended amendments will not solve

the problem already referred to, of the case where the contributor-spouse dies before superannuation benefits become payable to him and his interest passes directly to certain dependants not including his divorced spouse.

5.113 To overcome this problem Mr Justice Emery's working party recommended an alteration of Commonwealth policy to include divorced spouses as potential beneficiaries together with the necessary changes to Commonwealth superannuation and taxation legislation and to State legislation to effect this policy change.

5.114 The Committee has received a number of submissions proposing that the Superannuation Act of the Commonwealth should be amended to provide for a benefit to be payable to a former spouse upon the death of a contributor or pensioner under these schemes. Currently, reserve benefits are payable to widows, children, both legitimate and illegitimate, and, in specified circumstances, subject to the discretion of the Commissioner for Superannuation, to *de facto* spouses. It was submitted that the Commonwealth should become a pace setter in this regard by providing for a benefit to be payable to a divorced spouse.

5.115 The Committee considers that proposals for the provision of benefits to divorced spouses under superannuation schemes raise quite separate issues to those involved in a consideration of the Family Law Act. Such proposals raise issues of the availability of retirement benefits generally which need to be considered in a wider context than an inquiry into the provisions of the Family Law Act.

5.116 The Committee has been referred to the matrimonial property regimes of various other countries, notably those of New Zealand, West Germany and certain Canadian provinces and to the treatment of superannuation benefits under those schemes. Later in this chapter the Committee recommends an inquiry by the Australian Law Reform Commission into the feasibility of the introduction of a matrimonial property regime in Australia. It is considered that this would be a more appropriate inquiry in which to consider the rights of the parties to a marriage in superannuation schemes. It would, therefore, be premature to recommend that the Commonwealth legislate to provide benefits to divorced spouses under the legislation setting up the schemes administered by it. It would be preferable for the Commonwealth to await the outcome of the proposed Law Reform Commission inquiry before deciding what amendments would be appropriate.

Family Company and Trust Arrangements

5.117 It has been brought to the Committee's attention that problems can arise in property proceedings under the Family Law Act where the property in which one of the parties claims an interest is subject to a family trust or company arrangement.[50] The problem was explained by the judges of the Family Court in their submission to the Committee in the following terms:

> Although the court has wide powers to deal with property under s.79 it can deal directly only with legal and equitable interest which a spouse holds in relation to property. The court cannot deal directly with the unascertained interest which a spouse may have in a discretionary trust ... nor can it make orders to transfer or settle property owned by a company even though a spouse has a controlling interest in that company.

5.118 It would appear that there are two distinct situations in which the Family Court can be faced with a problem of a family company or trust arrangement:

- the first is where a family trust or company has been established some time prior

to the breakdown of the marriage and for a reason (e.g. reduction of tax liability) entirely unconnected with a possible breakdown of marriage;

- the second is where such a scheme is organised by one of the parties in anticipation of a coming breakdown of the marriage and consequent property adjudication by the court.

5.119 In the second situation, the court may be able to set aside the transaction under s.85 of the Family Law Act. Section 85 gives the court wide powers to set aside any sale, gift or other disposition designed or likely to defeat an existing or anticipated property or maintenance order. It does appear however, that, to date there have been few decisions under s.85, and so the exact scope of the power that can be used under s.85 remains to some extent uncertain. Furthermore, it is interesting to notice that the Committee was told by the Principal Registrar of the Family Court that the deliberate disbursement of assets was frequently overemphasised as a problem.[51]

5.120 It is the first of the abovementioned situations, that is where the trust or company had been established before the breakdown of the marriage and for reasons unconnected with such a possibility, that greater problems are posed for the court.

5.121 The Family Law Advisory Committee of the Law Council of Australia in its submission to the Inquiry recommended the inserting in the Act of a wider definition of property, for example a definition along the lines of that in the Bankruptcy Act.[52] It was considered this would assist the court in dealing with the problems of family property vested in trusts and companies. The Law Council's Committee conceded, however, that such an amendment would not solve the problems of the want of jurisdiction in the court where the assets in question are under the control of parties other than the parties to the marriage.

5.122 The Family Law Practitioners of Tasmania submitted in relation to the Law Council Committee's suggestion that:

> The Association does not believe that an extension of the definition of property will assist the court in making orders. This is because the interests of parties in trusts, companies or superannuation schemes are often incapable of being dealt with unilaterally by such party. Such trusts and funds are under the complete control of trustees and the party to the matrimonial litigation is merely a beneficiary with no effective means of control of receipts from the trust or fund.
>
> For this reason the Association believes that there should be special provision in the Act for the making of orders adjourning a claim for maintenance or settlement of property in cases where there are family trust, company interest or superannuation fund benefits and the case called on again when a benefit is received by the spouse from one of these entities. In the meantime it should be provided that the beneficiary should be ordered not to dispose of such benefit and should notify the other party upon receipt of such benefit. It could further be provided that the trustees of the fund be required to inform the registrar of the court upon payment out of a sum of money to the beneficiary and the registrar required to do his best to inform the claimant at his or her last known address.

5.123 This recommendation for a provision in the Act for the adjournment of property proceedings where there are trust, company or superannuation entitlements involved coincides of course with the recommendation of Mr Justice Emery's working party on superannuation referred to earlier in this chapter. The Committee has recommended the acceptance of this recommendation for such an amendment to the Act; See para 5.109.

Death of a Party to Property Proceedings

5.124 The Committee has received a number of submissions chiefly from legal practitioners' associations, which have expressed concern at the injustices that can be caused:

- either when a party to matrimonial property proceedings dies before such proceedings are completed;
- or when a party to a divorce dies after the divorce decree has been granted but before property proceedings have commenced.

5.125 While the Family Law Act expressly provides:

- that certain maintenance orders may continue after the death of the person liable to make payments under the order and as such be binding against the estate of the deceased (s.82(3)); and
- that any decree made under the Act may after the death of the person liable under the decree, be enforceable with the leave of the court against the deceased's estate (s.105(3)).

the Act is silent on the questions as to whether or not property proceedings must cease on the death of a party to them, and as to whether such proceedings can be instituted by or against the estate of a spouse who dies subsequent to a decree of dissolution being granted, but before the institution of property proceedings.

5.126 Until the decision of the Full Court of the Family Court in 1979 in the case of *Pertsoulis* v. *Pertsoulis*,[53] it was generally thought that property proceedings must abate on the death of a party to such proceedings.[54] But following the *Pertsoulis* decision it seems that property proceedings do not in fact abate on the death of the party. The facts of *Pertsoulis* were extremely complex and somewhat peculiar. It is therefore possible that the decision in that case to allow property proceedings to continue after the death of a party might have rested on the very unusual circumstances of that case and not be of general application.

5.127 The matter would, of course, be placed beyond doubt if the Act were to be amended to provide that a pending claim for a property order or for a maintenance order shall not abate by reason of the death of the spouse against whom the claim is made. Such an amendment has been recommended by Mr Justice Emery's working paper on Superannuation. A similar recommendation has been made by the Family Law Council in its Working Paper No. 5 entitled *Property and Maintenance after the Death of a Party*.[55] This Committee has already recommended earlier in this chapter that such an amendment should be made to the Act; see para 5.110.

5.128 Both the *Pertsoulis* decision and the amendment to the Act proposed in the last paragraph relate to the issue of the continuation of property proceedings after the death of the spouse against whom the claim is made. They do not relate to the question as to whether property proceedings can be commenced by a surviving spouse when the other spouse dies after the divorce decree has been made absolute, but before proceedings for a property order have been commenced.

5.129 The rights of a divorced spouse to bring an action against the estate of his or her former spouse is at present governed by Testator's Family Maintenance legislation of the various States. There is wide variation between the States as to the rights of a divorced spouse against the estate of his or her former spouse.[56] Indeed in New South Wales a divorced spouse has no right of application at all, although there are proposals for reform in this matter in that State.[57] Furthermore, the principles applicable to the division of an estate under State succession laws are generally more restrictive so far

as a former spouse is concerned than those applicable in property disputes under s.79 of the Family Law Act.

5.130 The Family Law Advisory Committee of the Law Council of Australia recommended that where a spouse dies subsequent to the granting of the decree absolute the surviving party should be able to commence within 12 months of the date of the death of the other party an action for a property order. The Law Council's Committee further proposed that such a property action should be settled 'prior to the Testator's Family Maintenance application in order to ensure that the true nature of the testator's estate is established'. While it acknowledges that such provision for the commencement after the death of a spouse of an action under the Family Law Act may cause difficulties with regard to State Testator's Family Maintenance legislation, the Law Council's Committee nevertheless considered that it is important to maintain a right of application to the court by a former spouse.

5.131 The Family Law Council has also considered the relationship between the States' Testator's Family Maintenance legislation and the Family Law Act.[58] Because testator's family maintenance remains at present within the legislative power of the States, the Council made no specific recommendations concerning it. However in its working paper on the subject the Council stressed the desirability of achieving uniformity between the States as to the categories of persons entitled to apply for testator's family maintenance, and of these categories including the survivor of a marriage that has been dissolved. The Council also stressed the desirability of uniformity between the principles applied with regard to a former spouse under the Testator's Family Maintenance legislation of the various States and a claim for a maintenance or property settlement made under the Family Law Act.

5.132 The Committee agrees that it would be desirable to achieve a situation in which in all States a divorced spouse could claim a share of his or her former spouse's estate under the Testator's Family Maintenance legislation, and in which the principles applicable to such a claim would be uniform with those applicable to property or maintenance claims under the Family Law Act. Furthermore the Committee urges the States to consider the enactment of such uniform Testator's Family Maintenance legislation. Consistent with its support for Commonwealth/State Co-operation expressed elsewhere in this Report, the Committee would prefer to see the States enact such uniform Testator's Family Maintenance legislation, rather than the Commonwealth take unilateral action pursuant to the marriage power of the Constitution to amend the Family Law Act to provide for the institution of a property claim by a former spouse following the death of the other spouse.

The Nature of a Party's Contributions to Property under s.79(4) (a) and (b) of the Family Law Act.

5.133 Section 79 (4) of the Family Law Act provides that in considering what order should be made in proceedings for the alteration of property interests under s.79, the court must take into account among other factors:

(a) the financial contribution made directly or indirectly by or on behalf of a party, or a child to the acquisition, conservation or improvement of the property, or otherwise in relation to the property;

(b) the contribution made directly or indirectly to the acquisition, conservation or improvement of the property by either party including any contribution made in the capacity of home maker or parent.

5.134 Dr Kevin Gray of Cambridge University, the author of a recent book entitled *Re-allocation of Property Interests on Divorce* has made the following comments on s.79(4) (a) & (b) in his submission to the Committee:

> It is significant that both section 79(4) (a) and section 79(4) (b) refer to contributions 'made . . . to the acquisition, conservation or improvement of the property' . . . It is true that both paragraphs allow of the possibility that contributions may be made either 'directly or indirectly', and section 79(4) (a) even provides that a financial contribution may be made in any way 'in relation to the property'. However, the problems which have arisen in the context of contributions centre around the apparent implication in section 79(4) that there must be some kind of nexus between the contribution claimed by a spouse (whether financial or domestic) and 'the acquisition, conservation or improvement of the property'. The requirement of a nexus imposes upon a claimant spouse an onus of proof which it may be difficult to discharge. In the event that such onus is not discharged, the result is that justice is not done to the spouse whose contributions cannot positively be related in retrospect to the acquisition, conservation or improvement of matrimonial property.[59]

5.135 The Committee considers that there ought not be a nexus between a financial or domestic contribution of a spouse and a particular item of property. It considers that in determining the property interests of divorcing couples, it is the contribution of a party 'to the welfare of the family including any contribution made by looking after the home or caring for the family', that ought be considered. This is the provision in the UK legislation.[60] The Committee notes the comments of Mr Justice McCall of the Family Court of Western Australia in a paper entitled *Family Law and Property*, that the Full Court of the Family Court appears to be adopting an interpretation of s.79(4) (b) as if it read in similar terms to the English provision.[61] However, Mr Justice McCall noted that certain single judge decisions have required the nexus between the contribution and the specific property.[62] In order to put the matter beyond doubt, the Committee makes the following recommendation:

Recommendation 35

To ensure that the contribution of a spouse to be considered is his or her contribution to the welfare of the family that there be an amendment to s.79(4) to remove any possibility of an interpretation requiring a nexus between a spouse's contributions to and a specific item of property.

The Future of Matrimonial Property Law in Australia

Other systems

5.137 During the course of this Inquiry the Committee's attention has been directed to developments in matrimonial property law elsewhere in the world.[63] We will canvass as briefly as possible the main developments and features in those foreign systems which have been most commonly brought to our attention.[64]

Continental Europe

5.138 Most continental countries have had systems of community of property for many years. Although the older systems differed one from another, in many respects they had one feature in common: the husband had exclusive rights of administration of the property. However, with the emancipation of women came demands for reform of this feature of the European systems.

5.139 In response to these demands for reform the Scandinavian countries introduced

a new principle to this community of property system. This principle was that during marriage each spouse should have equal rights to acquire, deal and dispose of property independently of each other, but at the end of marriage each should have a half share of the total remaining property of both spouses. This system, known as deferred community of property is still in force in Sweden, Norway, Denmark, Finland and Iceland.

5.140 In West Germany in 1957 the Law on Equal Rights of Men and Women introduced a new statutory regime for matrimonial property (Zugewinngemeinschaft). As under the Scandinavian laws, each spouse retains equal and independent power to own and administer property during marriage. At the end of marriage each is entitled to half the surplus, i.e. the amount by which the total of the property owned by both of them at the end of the marriage exceeds the value of the property owned by them before marriage.

5.141 In France, the traditional system of full community of property under which the husband administered the property has been transformed over the years by laws allowing married women to control and manage their own earnings and savings. A major reform of the system was effected in 1965. The terms of the new regime, called community of acquests, were fiercely contested, particularly as regards the spouses' powers of management. The result was a compromise: the husband is the nominal head of the community with powers of management over it, but the wife's consent must be obtained for many transactions, and she is given independent power to administer her separate property. The property falling into the community is limited to that acquired during the marriage other than by gift or inheritance; but each spouse's income and earnings remain the separate property of that spouse.

The United Kingdom

5.142 In the United Kingdom there has been in recent years a movement to reform away from the system of separate property between spouses which, as in Australia, has prevailed since the passage of the Married Women's Property legislation at the end of the 19th Century. This movement began in 1959 with the *Royal Commission on Marriage and Divorce* (Morton Commission) which considered the possibility of the introduction into English law of community of property between husband and wife. The majority of the Commission finally rejected community of property. Some reform in U.K. matrimonial property law did come in 1970 with the *Matrimonial Proceedings and Property Act* ss.4 and 5 (now the *Matrimonial Causes Act* 1973 ss.24 and 25). This legislation gives the court a discretionary power upon marriage breakdown to make provision for the financial support of the economically weaker partner in the marriage and gives the court the power to re-arrange the property of either party to reflect the contributions of the party to the marriage and family life. Further consideration in the direction of a community of property system was undertaken by the U.K. Law Commission in its Working Paper (no. 42) in 1971 and in its First Report on Family Property (no. 52) in 1973. In its Working Paper the Law Commission did propose a system of deferred community of property. But in its Report the Commission did not proceed with the recommendation for a deferred system in relation to all property, although it did recommend the introduction of co-ownership of the matrimonial home. In its Third Report on Family Property (no. 86) (1978) the U.K. Law Commission made detailed recommendations in connection with the matrimonial home. Basically the Commission's proposals are that in the absence of a contrary agreement, all matrimonial homes should be jointly owned on a matrimonial home trust. Where one spouse alone holds the legal title then the other

should be entitled to protect his beneficial interest by registration and should also be able to apply to the court for an order vesting legal title in their joint names. The law Commission's proposals also contain a plan for allocating household goods in the event of conflict within the family. This plan does not involve any alteration in the ownership of these chattels but only their use and enjoyment.

New Zealand

5.143 With a view to recognising 'the equal contribution of husband and wife to the marriage partnership', New Zealand has recently introduced a scheme of deferred property sharing in marriage in the form of the *Matrimonial Property Act* 1976. The main features of the New Zealand scheme would appear to be as follows:

- So far as property rights are concerned, a marriage has 2 phases: (i) while the marriage subsists each spouse is broadly free to deal with his or her own property, (ii) on the breakup of the marriage an application may be made to have the court apportion this property under the new regime.
- The new regime divides property into (i) MATRIMONIAL PROPERTY (ii) SEPARATE PROPERTY, (iii) BALANCE MATRIMONIAL PROPERTY.
- 'Matrimonial Property' is defined to include the matrimonial home whenever acquired, family chattels (which includes household furniture, vehicles, caravans, trailers, boats, pets, but does not include chattels used wholly for business purposes or money or securities), all property jointly owned, and property owned before marriage if acquired in contemplation of marriage, insurance policies and pensions. 'Matrimonial Property' is presumed to be shared equally. But this presumption can be rebutted in certain circumstances eg: marriages of short duration.
- 'Separate Property' is all other property which is not matrimonial property and would principally include property owned before marriage or acquired gratuitously after marriage if that property had not become 'common property' (ie. property acquired for the common use and benefit of both the husband and wife out of property owned by either of them before the marriage). 'Separate Property' is retained by each party. However, the non-owner spouse may in certain circumstances make a claim against the other's separate property.
- 'Balance Matrimonial Property' is property which is neither 'Matrimonial' nor 'Separate' Property. 'Balance Matrimonial Property' is shared equally by the spouses unless one spouse's contribution to the marriage partnership has been greater than the other's.
- It is possible to contract out of the provisions of the New Zealand Act.

Canada: Ontario

5.144 In 1974 the Ontario Law Reform Commission in its Report *Family Property Law* recommended a change in the system of redistributing assets of parties to a marriage after divorce by the introduction of a deferred community of property system. The recommendations of the Ontario Commission were partly implemented in the *Family Law Reform Act*, 1978. By this Act 'family assets' are defined as the matrimonial home and property owned by one or both spouses or their children while they are residing together. Upon a *decree nisi* being pronounced each spouse is entitled to have the family assets divided in equal shares, notwithstanding the ownership of the assets. The court is then given a discretion to make an unequal division if it would be equitable to do so having regard to any agreement, the duration of cohabitation, the time when the property was acquired, or the extent to which the property was acquired by inheritance or gift.

Canada: Alberta

In 1978 the Legislature of Alberta passed a new Matrimonial Property Act based upon the presumption of equal sharing modified by judicial discretion which must be exercised according to prescribed guidelines. In essence the legislation provides that, on marriage breakdown, property acquired during marriage will be shared equally by the two spouses unless the court decides it would be unfair to do so. If the two parties agree upon a basis for sharing this property a court order is not necessary. In case of disagreement, however, the court will decide what is a fair distribution. When deciding how matrimonial property should be distributed when one or both spouses disagree with an even split of possessions the judge must consider thirteen different factors. These guidelines are as follows:

1. Contribution made by each spouse to the marriage and to the welfare of the family, including work as a homemaker, parent, farm labourer etc.
2. Contribution made by a spouse to any business farm or enterprise owned by one or both of them. This could be a financial contribution or otherwise made directly or indirectly to acquiring, improving or managing it.
3. Contribution made by either spouse to the acquisition, conservation or improvement of their property.
4. Financial resources of each spouse at the time of marriage and at the time of the hearing before the judge. This could include income, earning capacity, liabilities obligations, property or other resources.
5. Length of the marriage.
6. Whether the property was acquired while the two were living separately.
7. Any oral or written agreement made between the spouses.
8. Whether a spouse gave or transferred property to a third person.
9. Whether the property had already been transferred between spouses by gift, by agreement or by another matrimonial property order.
10. Terms of any previous court order.
11. Any tax liability by one spouse which might result from transfer or sale of property.
12. Whether one spouse has dissipated property to the other's disadvantage.
13. Any other relevant circumstance.

Certain property is exempt from distribution under this new legislation. Property owned before the marriage is not included but any increase in value or income gained from it after marriage will be included in the distribution. Inheritances or gifts from other persons, or proceeds from a life insurance policy are exempt but any increase in their value is not. The initial valuation of such property is taken at the time of marriage or at the time it is received at a later date. The new law states that married persons may make contracts between themselves about their matrimonial property. A marriage contract would override the Act and allow spouses to be bound by the rules they choose.

The Trend in Australia

5.145 The Committee has noted with interest the following comments by Mr Justice McCall in his paper previously referred to:

> The experience under the Act in the last three years would indicate that there is more than an embryo deferred community of property system developing with respect to family assets. This is indicated in two decisions of the Full Court of the Family Court . . . *Wardman* v. *Hudson* and *Potthoff* v. *Potthoff*. In the two cases referred to above the court was making specific reference to jointly owned assets or assets which had been acquired or built up with the joint efforts of the parties in a marriage which had lasted for a number of years. In the vast majority of cases these assets would be what one might call 'family assets', namely the matrimonial home, its contents and perhaps some items of personalty such as motor vehicles, etc. There is with respect to these assets a strong presumption, in a marriage that has lasted for any significant period of time, that they should be shared equally. It is with respect to this presumption that perhaps it could be more clearly defined or spelt out in the statute. Exceptions to deal with short marriages and absence of contribution to the welfare of the family or the property would have to be provided. But the benefit of introducing a presumption of this sort would be to dispel misunderstanding that may still be existing in the Australian community that marriage is a partnership, both social and economic, and that in the normal run of marriages at least this property would be shared equally unless there were some good reason for not doing so.
>
> With respect to other property that may have been acquired by one or other of the parties the existing principles of showing the contribution to the acquisition or preservation of that property would continue.

5.146 In the case of *Potthoff* v *Potthoff*,[65] referred to by Mr Justice McCall the Full Court of the Family Court made the following statement:

> . . . where a court under the Family Law Act is dealing with jointly owned assets or assets which are acquired or built up by the joint efforts of the parties in a marriage which has lasted for a number of years, equality is, in (our) view, at least the proper starting point. One should then look to the individual case to see whether a change from that position is in all the circumstances justified.

5.147 And again in the case of *Wardman* v. *Hudson*,[66] also referred to by Mr Justice McCall, the Full Court has said:

> It appears to us that in relation to a jointly owned property of parties whose marriage has broken down or in respect of a property which has been acquired jointly by such parties as a result of their joint contributions over a significant period of time, that at least a proper starting point is that property upon dissolution of the marriage and the resolution of the financial issues between them ought to be treated as jointly owned and ought in ordinary circumstances to be divided equally between them. This we consider is at least a strong *prima facie* position.

The Committee's Conclusions and Recommendations

5.148 The Committee sees the following consideration as important in any determination of the characteristics of matrimonial property law in modern Australian society.

5.149 There would be advantages in having a law which is a precise and explicit exercise of Commonwealth power prescribing with certainty the property rights of parties to a marriage. We see virtue in such a law stemming from the Commonwealth power to legislate with respect to marriage rather than from the divorce power. It is our view that the institution of marriage would benefit if the rights and responsibilities that it gives rise to were acknowledged explicitly by the law. This would mean that people entering matrimony would know, in advance, the legal effect of marriage on their property rights. It would also mean that people contemplating divorce would be able to determine with greater certainty the material consequences of this step.

5.150 It is also necessary to affirm the fact already recognised by s.79(4) (b) of the Family Law Act that marriage today is coming to be recognised as a partnership equally founded in its economic aspects, upon a functional division of co-operative labor between the spouses.

5.151 Another important consideration which has influenced the Committee's thinking is the need to ensure that the law does not give the appearance that it acts in an arbitrary and capricious way to divest a person of property. This is the danger of provisions like that contained in s.79 whereby a court is empowered to alter existing property rights. From the submissions we have received we have obtained the impression that the feeling is widespread amongst men that the present law operates as an asset stripping device. The converse to this is reflected in the submissions we have received from many organisations representing women which reflect a sense of injustice at not receiving recognition for their contributions as homemaker or parent.

5.152 On the other hand the existing powers of the court may in one respect result in more substantial equity being done in individual cases because of the opportunity given to the court to make extensive inquiries and take into account a wide variety of factual circumstances in making its awards. This has to be balanced against the costs incurred by the parties in purchasing this refined form of justice and the costs incurred by the State in providing courts and facilities. It also becomes incumbent on the State to provide legal aid so that access to the refined justice administered by the courts is available equally to all. One object of the law ought therefore to be to facilitate negotiated settlements to property claims between divorced spouses:

> The law should, perhaps most importantly, provide divorcing parties with distinct signposts to guide their informal bargaining in the hope that the often officious and always costly intervention of courts and lawyers may be avoided and the danger of oppressive bargaining averted. Above all, the primary purpose of the law should be to emphasise the idea that certain moral commitments flow from the fact of marriage . . . commitments which impinge not least upon the economic aspect of marriage and which must come to expression even on divorce.[67]

5.153 But it is only reasonable to note some observations warning against precipitating too rapidly a change in the laws governing the distribution of matrimonial assets upon divorce. The Family Law Act has only been in force for four years. It made substantial changes to the law. To change the ground rules so soon might cause confusion and upset reasonable expectations. Any interference with the ground rules as they affect ownership of property need to be carefully considered because of their psychological impact. The realities of the federal compact must be heeded. A policy transferring powers over property in a traditionally State area to federal legislative control needs to be negotiated carefully to ensure that its impact on legitimate areas of State responsibility is not disruptive. Any proposal for a Matrimonial Property Regime would need to address itself to the problems of limits: what property is to be regarded as joint matrimonial property and what property is to be regarded as that of the spouses individually.

5.154 The case against a too hasty introduction of a Matrimonial Property Regime was put in the paper by His Honour Mr Justice McCall previously referred to:

> I was at one stage attracted by the idea of introducing a system whereby rights of parties to a marriage were more clearly defined. The attraction of such a system must be that litigation would be reduced and upon the break-down of a marriage the parties would have less cause for feeling aggrieved at certain decisions. Theoretically, they would know at the time of marriage what the outcome would be with respect to property if the marriage ever broke down. It would simply be a case of applying some clearly defined principles in an Act to the sum total of the parties' properties. Attractive as this proposition may be, however, the more one considers the variety of property situations within which it was acquired, and considerations to be taken into account, the more one appreciates how a rigid system may well work greater injustices than the present one. What is clear from a cursory examination of some of these other systems is that no sooner is a principle enunciated than a number of exceptions are created, or an overriding discretion given, to ensure that the determination of the dispute by the rigid application of the principles does not work injustice.

In concluding that the existing system had merits, Mr Justice McCall said:

> Although one may think that the results are therefore unpredictable, this, in my view, is not the outcome of the last three year's experience under the Family Law Act. Of course, different judges may take a different view of some aspects of the evidence which would result in minor variations to the ultimate decision. But, as with the development of the common law, as more decisions are made so do the principles become clearer. The resultant discretion in the court, however, enables injustice in an individual case to be avoided. One would hope that the thinking of the judges was sufficiently attuned to that of the community to ensure that injustice is avoided or reduced to a minimum.
>
> Given the choice of introducing a system with clearly defined distribution rights to property upon a breakdown, with all its necessary qualifications and given the present Australian system, it would seem to me that we should persevere longer with our present system before suggesting any radical changes. At least we should benefit from the experience in New Zealand and Ontario. It may well be that, in the course of time, those systems may produce a better result than our own, but rather than introducing such a system at this stage, I believe we should wait to see the experience of these other countries.

Recommendation 36

5.155 *The Committee recommends that arrangements for the introduction of a full Matrimonial Property Regime should be preceded by:*

(a) *a survey to establish community attitudes to the proposal;*

(b) *a full study carried out by the Law Reform Commission of the legal implications of the introduction of such a scheme;*

(c) *the assessment of the experience of the New Zealand and various Canadian schemes.*

5.156 The Committee has directed its attention to the desirability of amending the Family Law Act so as to presume the matrimonial home to be owned jointly by the parties to the marriage. Such a presumption would reduce the uncertainties concerning ownership of the matrimonial home which is generally the principal asset of the parties to a marriage.

5.157 It is noted that a presumption of joint ownership has applied with respect to the matrimonial home for some seventeen years in the State of Victoria. The Victorian legislation confines its operations to the dwelling and its curtilage which is wholly or principally occupied as the parties' matrimonial home. The presumption is rebutted by sufficient evidence or intention to the contrary or special circumstances which appear to the judge to render it unjust.

Recommendation 37

5.158 *The Committee recommends that the Family Law Act be amended to provide that during the subsistence of a marriage and on the breakup of a marriage, the parties to the marriage will be presumed to own the matrimonial home in equal shares.*

5.159 The Committee envisages that the amendments that would be necessary to the Act to establish the rights of a married couple in the matrimonial home would be as follows:

- the insertion of a statement of principle at the commencement of the sections of the Act dealing with property, to the effect that the parties to a marriage shall be presumed to hold or to have held as tenants in common in equal shares any

dwelling or part of dwelling together with its curtilage which was acquired by both or either of them at any time during the marriage or in contemplation of the marriage and with the intention that it be occupied as the matrimonial home;

- there would then follow a provision permitting parties to a marriage or persons contemplating marriage to contract out of the general presumption by means of a written agreement; it would be necessary to provide that prior to signing such an agreement contracting out of the presumption, each party have independent legal advice, and that the execution of such an agreement be strictly witnessed; an agreement on which legal advice had not been taken, or which was not in writing or which was not properly witnessed would be void;
- there would also be provision for the court to declare an agreement contracting out of the general presumption, void, in circumstances in which the court considered that it would be unjust to give effect to that agreement;
- there would need to be amendments to s.79 of the Act (the section empowering the court to alter interests in property) to provide (a) that in exercising its provisions under that section, the court must take into account the general presumption of equal ownership of the matrimonial home or the terms of any agreement contracting out of that presumption and (b) that in proceedings under the section the general presumption could be rebutted by sufficient evidence of intention to the contrary and also by the existence of any special circumstances which appeared to the court to render it unjust to apply that presumption in the particular case.[68]

5.160 It is envisaged that these amendments would enable a wife in the case of Real Property Act land, to lodge a *caveat* against the title to the matrimonial home, which would stand up to any challenge made to it. It would be necessary to obtain the co-operation of the States in amending the relevant State legislation in relation to Old System Title.

It should be noted that it is not intended that any such provision should apply retrospectively to existing marriages although it may be provided, in respect of such marriages that the parties may contract in to the provision.

5.161 It might also be necessary to provide in the Act that neither the presumption of joint ownership of the matrimonial home nor the provision for contracting out of it, shall affect the law relating to the imposition, assessment and collection of estate duty and death duty. The Committee also notes the general difficulty that must be met in any proposal for joint ownership of the matrimonial home where the home is used partly as the premises for a business operated by one of the parties to the marriage.

ENDNOTES

[1] Finlay and Bissett-Johnson—*Family Law in Australia*, p. 448, p. 455, Butterworths, 1972.

[2] Ibid at pp. 457-458.

[3] Asche, *'Changes in the rights of Women and Children under Family Law Legislation'* 49 ALJ p. 387 at p. 391.

[4] Litherland *'The Law Relating to Maintenance of Wives and Children'* Law Book Company, 2nd Edition 1959 p. 7, Finlay & Bissett-Johnson op. cit. at p. 453.

[5] *Fleming* v. *Fleming* (1963) 4 FLR 91.

[6] *Adams* v. *Adams* (1969) 11 FLR 197. *Fleming* v. *Fleming* (1963) 4 FLR 91. Nygh *'Guide to the Family Law Act 1975'* Butterworths 2nd Edition 1978 at p. 110.

[7] *Davis* v. *Davis* (1963) 5 FLR 398; *Rogers* v. *Rogers* (1962) 3 FLR 398; Nygh op. cit. p. 109.

[8] 116 CLR 366.

[9] Ibid at page 375.

[10] The matter is discussed in some detail in the CCH *Australian Family Law and Practice* 26 500.

[11] Senate Standing Committee on Constitutional and Legal Affairs—Report on *The Law and Administration of Divorce and Related Matters and the Clauses of the Family Law Bill 1974*—Parliamentary Paper No 113/74.

Law and Poverty in Australia—Second Main Report of the Commission of Inquiry into Poverty 1975.
Report of the *Royal Commission on Human Relationships* (1977).
Family Law Council, Draft Working Paper on Maintenance Enforcement (1979).
See also the most recent annual Report (3rd) of the Family Law Council para 125.
The council has continued its consultations with the Department of Social Security on the inconsistencies between the *Family Law Act* and the *Social Services Act* and on the requirement that persons applying for Social Security benefits take steps to recover maintenance from the other party to the marriage.
As part of its study of the relationship between maintenance and social security, the Council requested that the Family Court of Australia conduct a survey of maintenance orders made during November 1978 in the Parramatta and Melbourne registries. A similar study was carried out in the Family Court of Western Australia. Some of the results of this survey are set out in Working Paper No. 4 'The Enforcement of Maintenance under the Family Law Act'.
The Council was asked to provide information to the Department about the following matters: the average amount of maintenance ordered for spouse and children; the average period during which payment is made under orders; the default pattern; the success rate in chasing defaulters; the cost of running the courts in regard to maintenance enforcement; the amounts paid by ALAO in regard to maintenance orders and the enforcement of maintenance. This information may give some indication of the effect on pension entitlements of maintenance orders and of the costs involved in maintenance proceedings and in the enforcement of maintenance orders. It may show whether there is any real benefit to Commonwealth funds from maintenance orders. Some of the necessary information is set out in Working Paper No. 4. The Council is seeking further information on these matters.

[12] Dixon and Foster—*Social Welfare Policy for a Sustainable Society*—Social Welfare Policy Secretariat Report—May 1980.

[13] *Brady* v. *Brady* (1978) FLC 90-513 per Bulley J. at p. 77, 703.

[14] *Wong* v. *Wong* (1976) 2 FAMLR 11, 159 at p. 11, 164 per Carmichael J.

[15] *Law and Poverty in Australia* op. cit. p. 178.

[16] Transcript of Evidence for 23 March 1979 p. 1803.

[17] *Report of the Committee on One Parent Families*—CMND 5629 at p. 152-153.

[18] The main points of difference between the above benefits are:
(i) for the purposes of Class A and Class B widows pensions', a 'deserted wife' is defined in the Social Services Act as 'a wife who has been deserted by her husband without just cause for a period of not less than six months'. Thus, it is necessary to determine 'fault' in considering eligibility for a widow's pension as a 'deserted wife'. Such fault considerations are unnecessary in the case of a supporting parent's benefit which may be payable to spouses separated for any reason.
(ii) a Class B widow's pension may be payable to a 'deserted wife' without a child from age 50 (in some cases 45) but a supporting parent's benefit is not payable to a spouse without a child.
(iii) Class A and Class B Widow pensioners are subject to a special income test, entitled to a range of Commonwealth fringe benefits including pensioner health benefits (free pharmaceuticals and inclusion in the bulk billing arrangements under which doctors accept 85 per cent of the schedule fee in full payment for the services rendered, concessional telephone rental and mail redirection and reduced fares on Commonwealth rail and shipping services). Supporting parents are eligible for the above fringe benefits other than the pensioner health benefits.

[20] Transcript of Evidence—23 March 1979 at p. 1791.

[21] See *Issom* v. *Issom* (1977) FLC 90-238 at p. 76, 283.

[22] Ibid at p. 76, 290—The view relies substantially on the decision of the Court of Appeal (UK) in *Wachel* v. *Wachel* (1973) 1 All ER 829 especially at p. 835 where, referring to the changed philosophy embodied in the *Matrimonial Proceedings and Property Act* 1970, Lord Denning M. R. said 'in the vast majority of cases it (such argument) is repugnant to the principles underlying the new legislation, and in particular the 1969 Act. There will be many cases in which a wife (although once considered guilty and blameworthy) would have cared for the home and looked after the family for very many years. Is she to be deprived of the benefit otherwise to be accorded to her by s.45 (i) (f) because she may share responsibility for the breakdown with her husband? There will no doubt be a residue of cases where the conduct of one of the parties is in the Judge's words "both obvious and gross" so much so that to order one party to support another whose conduct falls into this category is repugnant to anyone's sense of justice. In such cases the court must remain free to decline to afford financial support or to reduce the support which it otherwise would have ordered. But short cases falling into this category, the Court should not reduce its order for financial provision merely because of what was formerly regarded as guilt or blame'!

[23] *Soblusky* v. *Soblusky* (1976) FLC 90-124 in the case the husband was able to resist the wife's claim for maintenance on the application of purely financial criteria. The disparity between her income and his.

[24] *Australian Family Law and Practice* CCH—26-045.

[25] Ibid. 28-045.

[26] *Family Law Council–Third Annual Report* para 254 at p. 42.

[27] *Report of the Taxation Review Committee* (Asprey)—Parliamentary Paper No. 136/75.

[28] Family Law Council—Third Annual Report para 131 p. 22.

[29] It is neither a "final judgment nor final order" for the purposes of Section 40 (1) (g) of the Bankruptcy Act, 1966. The reason for this appears to be that the right of a wife to support from her husband is not contractual, but rather based on the interests of society the wife and children should be supported by the husband and not left without maintenance; see *Re Frankel*, (1959) 19A.B.C.10. Further, as such an order cannot be finally fixed, but is capable of variation under Section 83 of the Family Law Act, and is also capable of discharge, so comprehending lump sum maintenance as well as weekly maintenance, it is not a final order in the relevant sense, but is brought out by the Privy Council in *De LaSala*

v. *De LaSala*, (1979) 2A.E.R.1146, an order for Lump Sum Maintenance or Weekly Maintenance does not finally dispose of the issues or, in the words of the Privy Council in that case:

"The Court that made the order has a continuing power to vary its terms, as distinct from making orders in aid of enforcing its terms under a liberty to apply."

In short, it would be necessary to amend the Bankruptcy Act by adding a further sub-paragraph to Section 40(3) to comprehend the present situation.

[30] Pursuant to recent amendments to the *Bankruptcy Act* 1966 maintenance payable under an agreement registered or approved by a court (in accordance with Family Law Act) or under an order will constitute a provable debt in the estate of a bankrupt or a deceased person where that maintenance is:

(i) arrears of periodical sums that were payable within 12 months before the date of bankruptcy; or

(ii) a lump sum payable before the date of bankruptcy.

In addition, any person with a claim for maintenance will be able to exercise any other rights which that person has outside the Bankruptcy Act.

[31] *Law and Poverty in Australia*—op. cit.

[32] See D. Kovacs—*Maintenance in the Magistrates' Courts How Fares the Forum*—1973 47 ALJ 725; *Getting Blood out of Stones: Problems in Enforcement of Maintenance Orders from Magistrates' Courts* (1974). 1 Monash Law Review 67, at p. 67-71; *Law and Poverty in Australia* op. cit. at p. 187.

[33] *Family Law Council Working Paper No. 4*, p. 69.

[34] Further amendments to the enforcement provision of the Act recommended by the Council were:

(a) Amendments of regulations 136, 139 (4), 144 and 145 to enable the Collector, Deputy Collector or Assistant Collector to apply for sequestration (reg. 136) and to transfer an order interstate. At present these functions can be performed only by registrars or by the Clerk of the Court.

(b) The inclusion of a provision to issue a warrant in the first instance where application is lodged under regulation 133 (2) but the whereabouts of the payer is unknown.

(c) Amendment of regulation 133 to authorise withdrawal of a warrant.

(d) A regulation (similar to regulation 169) to provide for the registration of agreements which come under s.87 of the Act.

(At present s.87 (8) provides that an agreement registered in the court which grants approval 'may be registered, as prescribed, in another court, having jurisdiction under this Act').

(e) Amendment of the provisions prescribing such registration by including the power to sell specific real estate. Alternatively amending the enforcement regulations to empower the court to make an order for the sale of a particular item of the respondent's real property in satisfaction of an unsatisfied order.

(f) Amendment of the Act along the lines of s.104 of the Matrimonial Causes Act to provide that a judgment under the Family Law Act should be treated as a provable debt for the purposes of bankruptcy provisions. (This amendment was supported by the Family Court Judges' Law Reform Committee).

[35] See for example the submissions of—Messrs. Ilbery, Bartlett and O'Dea; Mr P. E. Brotchie; Mr John Wade; Family Law Practitioners' Association of Tasmania; Family Court Judges; Law Council of Australia; National Women's Advisory Council; Family Law Practitioners' Association of New South Wales; Mr H. K. J. McKenzie; Mr R. W. Gee; Mr J. J. Moore.

[36] Section 87 (1) (j) of the Matrimonial Causes Act.

[37] *Zafiropoulos* v. *Zafiropoulos* 20 FLR 16.

[38] Also s.87 (1) (j) of the Matrimonial Causes Act.

[39] Section 83 of the Family Law Act.

[40] *Taylor* v. *Taylor* (1979) FLC 90-674 at p. 78, 597.

[41] See the Full Court of the Family Court in its decision in the *Taylor* case (1977 FLC 90-226) (May 1979) and the Family Law Council in its First Report (see paras 93-102 of that Report).

[42] Submission of the Family Law Advisory Committee, Law Council, para 4.12.

[43] *King* v. *King* (1977) FLC 90-299.

[44] Submission of the Family Court Judges, para 63.

[45] By the High Court in *Taylor's* case. op. cit.

[46] See for example the submissions of—Judges of the Family Court; Professor (Now Mr Justice) Nygh; Family Law Advisory Committee of the Law Council of Australia; Family Law Practitioners' Association of Tasmania; South Australian Law Society; South Australian Government; New South Wales Council of Social Services; Women's Action Alliance; Uniting Church of Australia Commission on Social Responsibility; Australian Catholic Social Welfare Commission; Church of England Social Questions Committee; Australian Federation of Business and Professional Women; Australian Federation of Women Voters; Knights of the Southern Cross; Army of Men and Women; Senator John Knight; Regular Defence Forces Welfare Association; Department of Finance; Mrs G. Ewens; Mrs E. Blom.

[47] Per Evatt C. J. and Murray J. in *Bailey* v. *Bailey* (1978) FLC 90-424.

[48] See the judgment of Fogarty J. in *Crapp* v. *Crapp* (1979) 90-615.

[49] *Finnis* v. *Finnis* (1978) FLC 90-437; *Murkin* v. *Murkin* (1980) FLC 90-806.

[50] See for example the submissions of—the Judges of the Family Court; Family Law Advisory Committee of the Law Council of Australia; Family Law Practitioners' Association of Tasmania.

[51] Transcript, p. 5327.

[52] The definition of Property in the Bankruptcy Act reads as follows:

'property means real and personal property of every description whether situate in Australia or elsewhere and includes

estate interest or profit whether present or future vested or contingent arising out of or incident to any such real or personal property'.

[53] (1979) FLC 90-613.

[54] See the submission of the Judges of the Family Court (para 68).

[55] The recommendation of the Family Law Council is as follows:

'the Family Law Act be amended to enable the surviving spouse to continue proceedings pending in court at the date of the death of the other party for maintenance and/or property settlement and that such legislation make provision for the proceedings to continue against the estate of the deceased party'.

[56] — In South Australia, a former spouse may apply for provision without restriction (Inheritance (Family Provision) Act 1972 (S.A.) s.6 (b)).

— In Queensland, Tasmania and Victoria a former wife may apply for provision but only if she has not remarried and if she was receiving or was entitled to receive maintenance from her deceased former husband (Queensland Succession Acts 1867-1968 s.89; Tasmania Testator's Family Maintenance Act 1912 s.3A; Victoria Administration Probate Act 1958 s.91).

— In Western Australia, a former spouse may apply but only if she is receiving or was entitled to receive maintenance from the deceased former spouse (Inheritance (Family Dependants Provision) Act 1972 s.7 (1) (b)).

— In New South Wales at the present time a divorced spouse cannot make a claim against the estate of the other spouse.

(This summary of the varying positions of a divorced spouse under the States' succession laws is taken from the N.S.W. Law Reform Commission's Report on the Testator's Report on the Testator's Family Maintenance and Guardianship of Infants Act 1916).

[57] In 1977 the New South Wales Law Reform Commission in its *Report on the Testator's Family Maintenance and Guardianship of Infants Act* 1961, recommended that a divorced spouse whether or not remarried should be entitled to make a claim against the other spouses' estate ONLY IF that person satisfied certain proposed eligibility conditions. In summary the proposed eligibility conditions are (i) whole or partial dependence on deceased at any time; (ii) membership of deceased's household at any time; (iii) being a person whom in the opinion of the court, the deceased ought to have provided for.

[58] Family Law Council Working Paper no. 5 'Property and Maintenance after the Death of a Party'.

[59] Submission to Inquiry Vol V pp. 6728-29, Dr Gray cites the following in support of his contention that a nexus is required between a spouse's contribution and a specific item of property:

— *Ramsey* v. *Ramsey* (1978) FLC 90-449.

— *Rowan* v. *Rowan* (1977) FLC 90-310.

— *Rainbird* v. *Rainbird* (1977) FLC 90-256.

[60] *Matrimonial Causes Act* 1959 (U.K.) s.25.

[61] Mr Justice McCall refers to the decisions of the Full Court of the Family Court to:

— *Rolfe* v. *Rolfe* (1978) FLC 90-466.

— *Wardman* v. *Hudson* (1978) FLC 90-466.

[62] The single judge decisions referred to by Mr Justice McCall are:

— *Rowan* v. *Rowan* (1977) FLC 90-310.

— *Rainbird* v. *Rainbird* (1977) FLC 90-256.

[63] See for example the submissions of—Professor (now Mr Justice) Nygh; Women's Electoral Lobby (NSW); Dr K. Gray; Mrs G. Ewens; Mrs E. Blom. See also the following papers:
Dorothy Kovacs: 'Matrimonial Property Law Reform in Australia: the "Home and Chattels" expedient. Studies in the Art of Compromise'.

[64] The summary of matrimonial property regimes in various European countries is largely based on information contained in the UK Law Commission's *Third Report on Family Property*. In its summaries of the UK, New Zealand and Ontario systems the Committee acknowleges the assistance of the papers prepared by Mr Justice McCall and Ms Kovacs referred to in the previous note. With regard to the alberta system see M. A. Shone—*Principles of Matrimonial Property Sharing Alberta's New Act*—Alberta Law Review Vol. XVII No. 2 1979 p. 143.

[65] (1978) FLC 90-475.

[66] (1978) FLC 90-466.

[67] Submission of Dr K. Gray, to Inquiry Vol V, p. 6722.

[68] See suggested draft of the necessary amendments to the Act to provide for this presumption at appendix 7.

Chapter 6

INJUNCTIONS

The Provisions of the Family Law Act

6.0 Injunctions under the Act may be granted both as a form of independent relief or by way of ancillary relief.[1] Section 114(1) of the Family Law Act makes provision for the granting of an injunction independent of other relief. It provides that, in proceedings of the kind referred to in para (e) of the definition of 'matrimonial cause' referred to in s.4(1), the court may make such order or grant such injunction as it thinks proper with respect to the matter to which the proceedings relate including an injunction for the personal protection of a party to the marriage or a child of the marriage or for the protection of the marital relationship or in relation to the property of a party to a marriage home. In s.114 proceedings the court has power to relieve a party to a marriage from the obligation to perform marital services or render conjugal rights (s.114(2)).

6.1 As originally enacted, para (e) of the definition of 'matrimonial cause' referred to in s.4(1) included, as a meaning of that phrase, 'proceedings for an order or injunction in circumstances arising out of a marital relationship'. In 1976 this paragraph was amended by Act No. 63 to read—'proceedings between the parties to a marriage for an order or injunction in circumstances arising out of the marital relationship'. This amendment limited proceedings to proceedings between the parties to the marriage.[2] That limitation, however, seems to leave open the possibility that, providing the proceedings as to the injunction sought are between the parties to the marriage, it might be possible to grant an injunction against some third party in those proceedings.[3]

6.2 A further limitation is that s.114(1) proceedings must relate to circumstances arising out of the marital relationship. *In the Marriage of Mills*, Demack, J. gave the following explanation of this limitation:

> . . . The mere fact that something happens between a husband and wife does not mean that it involves 'circumstances arising out of the marital relationship'. The event must be one which raises issues of law that are within the body of law defining marital relationships. In Australia, this body of law must be within the legislative competence of the Parliament of the Commonwealth of Australia. Thus, events which raise issues of criminal law, industrial law or fiscal law, cannot be brought within the 'marital relationship' simply because the circumstances involve a husband and wife and their children.[4]

6.3 Section 114(3) provides that a court exercising jurisdiction under the Family Law Act, other than in proceedings to which s.114(1) applies, may grant an injunction, by interlocutory order or otherwise (including an injunction in aid of the enforcement of a decree), in any case in which it appears to the court to be just or convenient to do so and either unconditionally or upon such terms and conditions as the court thinks appropriate.

6.4 Sub-sections (4), (5) and (6) of s.114 of the Family Law Act preserve the traditional means of enforcing an injunction by punishment for contempt of court and they also provide for other penalties which the court may exact for contravention or failure to comply with an injunction or order under s.114. These are:

- a fine not exceeding $1,000;
- a requirement to enter into a recognisance with or without sureties, in such reasonable amount as the court thinks fit, to comply with the injunction or order, or to be imprisoned until entering into such a recognisance or until the expiration of three months (whichever occurs first);
- an order to deliver up to the court such documents as the court thinks fit;
- such other orders as the court considers necessary to enforce compliance with the injunction or order.

6.5 In line with the general policy of the Act failure to pay a s.114(4) fine is not punished with imprisonment but enforced by the Registrar of the Court under regulation 132 by garnishee order, seizure of property or sequestration. Where the contravention or failure to comply with an injunction or order under s.114 is an offence against any other law, the person committing the offence may be prosecuted, and convicted under the law (but no person is liable to be punished twice in respect of the same offence).

6.6 Proceedings for an injunction may be instituted in the Family Court of Australia, the Family Court of Western Australia, the Supreme Court of the Northern Territory and in courts of summary jurisdiction. With regard to courts of summary jurisdiction, however, there are a number of limitations on the prosecution of proceedings for an injunction in such courts. So far as courts of summary jurisdiction in Western Australia are concerned, the Family Court of that State has exclusive jurisdiction in family law matters in the Perth metropolitan area.

6.7 A court of summary jurisdiction may not exercise jurisdiction with respect to property of a value exceeding $1,000 unless the order sought is not disputed or the parties agree to the court hearing and determining the proceedings. Failing such agreement, the case must be transferred to the Family Court of Australia or the Supreme Court of the State or Territory and such transfer may be ordered by the court of summary jurisdiction on its own motion even in cases where the parties agree to the court hearing the matter (s.46). It is therefore unlikely that courts of summary jurisdiction are able to exercise jurisdiction to deprive a party of the use or occupancy of the matrimonial home, but they may make a non-molestation order or order for the separation of the parties, where existing occupancy rights are not involved.[5]

Significance of Provisions of Act with respect to Injunctions

6.8 The injunctions power was perceived as an important component of the overall policy of the Family Law Act.[6] The inability of a spouse to seek immediate relief without a period of separation (such as was provided by the grounds of adultery and cruelty under the former Matrimonial Causes Act), makes it of great importance for parties to a marriage to be able to obtain injunctive relief so as to protect their person, their rights and, perhaps, even to commence the period of separation running so that divorce may ultimately be obtained. The section of the Family Law Act which provides for injunctive relief is intended to be used to aid a spouse who is living in an intolerable marital situation.[7] It is virtually the only remedy for a spouse who, by reason of financial necessity or obligation to children, is unable to leave a matrimonial home but for whom the situation is intolerable.

6.9 It is noted that the Senate Standing Committee on Constitutional and Legal Affairs gave careful consideration to the question of whether or not an alternative mode of proof of irretrievable breakdown should be included in s.48(1) and (2) of the

Family Law Act to cover cases in which, for example, as noted above, a wife is subject to intolerable conduct, but because of practical considerations is unable to establish an actual state of separation. On ultimate balance, the Committee was of the opinion that it would not be desirable to amend s.48(1) and (2) in order to cover such cases which they considered would normally be the subject of the exercise of the court's injunctions power.[8]

6.10 However, it has been suggested to the Committee in submissions and at public hearings, that s.114 of the Family Law Act has not proved sufficient to protect women and children from domestic violence. It was submitted that while the Family Law Act's injunction provisions are excellent as far as they go, that is, they enable a restraining order to be obtained at short notice in extreme cases and *ex parte* in cases of immediate threat, they offer little protection from domestic violence and they are extremely difficult and expensive to enforce if they have been breached.[9]

6.11 The other matter that has given rise to difficulties in this area of the law is the power of the court to make orders under s.114(1) restraining dealings with the property of parties to the marriage during the twelve months separation period that must elapse before an application for dissolution can be filed. Detailed discussions of these matters follow.

Injunctions in Respect of Property

6.12 In *Russell* v. *Russell*[10] the Hight Court held that the powers of the Family Court in respect of the property of the parties to the marriage could not be invoked until an application for dissolution or declaration of nullity had been filed. Therefore, it was generally considered that the Family Court's powers under s.114(1) to grant injunctions to restrain dealings with property between separation and the filing of an application for principal relief were limited.[11]

6.13 However, in *Seiling* v. *Seiling*[12] it was held that once a marriage has broken down the court's powers to grant an injunction under s.114(1) can be used to protect the incipient or inchoate right to seek a property order under s.79 of the Family Law Act. In this case, the view was taken that one should broadly interpret the injunction power to enable one to protect what Parliament had decreed one may get ultimately; a share or the right to claim a share in property based on one's contributions as housewife, wife and mother.[13]

6.14 The Committee has considered whether legislation is necessary to clarify the power of the court to grant an injunction to preserve a prospective right to a property order under ss.78 or 79 where no application for dissolution or nullity has been filed. In its Third Annual Report, the Family Law Council expressed the view that in the light of the decisions in the *Seiling* case (and the *Dovey* case), there is no immediate need for amendment of the Act.[14]

6.15 It is noted that there may be some slight doubt as to the binding effect of the ruling in the *Seiling* case because that court could have disposed of the case on another point.[15] It is open to argument that, as it was not necessary to rule on the question of the injunctive power in respect of property, this aspect of the decision in the *Seiling* case may be distinguished in later cases. Notwithstanding that the matter in the *Seiling* case could have been resolved on another point, the Committee is of the opinion that there is probably no immediate need for amending legislation in view of the fact that the principle that the court has power under s.114(1) to issue an injunction with respect to property during the separation period, appears to be accepted as a result of

the decision in the *Seiling* case (and also the *Dovey* case). It is noted that if power is referred to the Commonwealth, then an amendment to legislation will not be necessary. However, the Committee considers that an amendment to the Family Law Act to ensure that this power is available would be necessary should later court decisions cast doubt on the principle established in these cases.

Recommendation 38

6.16 *Therefore the Committee recommends that while there is no immediate need for an amendment of the Act to clarify the power of the court to grant an injunction to preserve a prospective right to a property order under sections 78 or 79, where no application for dissolution or nullity has been filed, such an amendment to ensure that this power is available would be necessary should doubt be cast on the principle that once a marriage has broken down the court's power to grant an injunction under section 114(1) can be used to protect the incipient or inchoate right to seek a property order under section 79.*

Protection of the Person

6.17 A very important issue for the consideration of the Committee is whether the injunctive orders available under the *Family Law Act* 1975 offer adequate protection to women, whether they can be promptly enforced and whether a power to arrest should be attached to an injunction issued under s.114(1). In the view of the Office of Women's Affairs and various women's refuge groups, the injunctive orders do not offer adequate protection to women because they cannot be promptly enforced. Broadly, these organisations recommended that a discretion to attach a power of arrest to an injunction issued under s.114(1) would go a long way to providing more adequate protection, and to ensuring that the injunctions and orders are more effective. The Commissioner of Police (Tasmania) submitted that perhaps the most common problem confronting police officers is the situation where one party to a dispute is interfering with or molesting the other, in defiance of an order of the court. In this kind of situation the Tasmanian Police recommended that some provision should be made in the Act to permit the court to grant power to the police in the orders it makes to arrest such a person.[16]

6.18 On the other hand, the Family Law Council is of the opinion that it is not necessary or desirable to introduce a provision to enable the court to attach to a restraining order a power of arrest which could be exercisable on the breach of an order because of injustices that could result in the other direction. In the Council's view, the existing legislation if properly used by the legal profession, does afford some protection to women.[17]

6.19 Further, it is noted that the Royal Commission on Human Relationships directed attention to the complexity of the issue of violence in the family. The Commission stated:

> There is no easy solution to the problems of family violence; some short term remedies and possible commendable work is being done, particularly by some women's organisations. The work of women's refuges is exemplary in selfless community action. But their work must now receive adequate and continued government support.
>
> Proceedings for assault appear to be a relatively effective remedy if the objective is to protect the woman rather than to punish the man. Many cases are not pressed. If the husband is fined or bound over, he may in fact still commit further acts of violence. In more serious cases the husband may be imprisoned, but this is not really a long-term solution to the problem faced by the husband or wife.

Nevertheless, we believe that the best has not yet been achieved. We would like to see determined efforts to make the law provide a real help to the couple, first by protecting the woman under threat and then realistically helping the couple either resolve their differences or to go separate ways temporarily or permanently. There is an urgent need for investigation, research and consultation on the part of police, the courts, counselling services, the attorneys-general, the legal profession, social workers and social welfare agencies, private and official.

In the long term, other approaches are required. Community education is essential to ensure that marital violence is more frankly discussed so that women are encouraged to seek help.

Community education should make women aware of the location of women's refuges, of the range of available social services and of their legal rights. Information booklets should be written and distributed to women seeking help and should also be available in the main ethnic languages.

More attention should be paid within schools to problems of family violence. Children need to grow up with an understanding of the nature of conflict and of the roles and relationships of men and women. They should have information about community resources, basic family law and social services. Girls should comprehend the consequences of dependency and their need for job skills.

It may not be possible to eliminate family violence but there is much more that we could do. We must examine our own attitudes to violence. We must question our views of family roles and relationships for these may contain the seeds of conflict. We must look at our values and customs. We must acknowledge that, as a community, we bear responsibility for the kind of environment that exacerbates violence, unless help is given to families who are in distress, violence is likely to persist from one generation to the next.[18]

6.20 Although in broad terms the Committee agrees with the conclusions, it is nevertheless of the view that specific powers are necessary. The Committee agrees with the submission of the Office of Women's Affairs, that s.114 (1) be amended to give the judge a power to attach a power of arrest to an order for injunction. The Office of Women's Affairs recommended as follows:

> At present in Australia the injunctive orders available under the Family Law Act do not offer adquate protection to women because they cannot be promptly enforced. The discretion to attach a power of arrest to an injunction issued under s.114 (1) of the Family Law Act would go a long way to providing more adequate protection, and to ensuring that the injunctions and orders are more effective. For these reasons the Office recommends to the Joint Select Committee that:
>
> (a) Section 114 of the Family Law Act be amended to give a judge a discretion to attach a power of arrest to an order or injunction where the judge:
>
> (i) makes an order or grants an injunction containing a provision relating to the personal protection of the applicant or a child of the marriage, or makes an exclusion order;
>
> (ii) is satisfied that the other party to the marriage has caused actual bodily harm to the applicant or the child; and
>
> (iii) considers that the other party is likely to do so again.
>
> (b) both the Federal and State police should have the power to arrest in cases where there is reasonable cause for suspecting a breach of the order or injunction by reason of violence or entry into the excluded premises or area. They should be required to bring the person so arrested before any judge or magistrate exercising jurisdiction under the Act within 24 hours and to seek the directions of the Court as to the time and place at which the arrested person is to be brought before the Court.
>
> It should be made clear that recommendation (b) is not concerned with the arrest and prosecution powers and practices of the police when they are summoned to a domestic disturbance. The recommendation is concerned solely with the efficiency of the orders and injunctions made under s.114 and with what happens when they are breached.
>
> These recommendations would involve dealing with the jurisdictional and indemnity problems which would arise when State police enforce the power of arrest attached to Family Court orders and injunctions. The recommendations would mean that State police would be able to arrest a person whom they reasonably suspect of breaching a Family Court order or injunction; the State police would have to apply to a Court for directions as to the time and place at which the person arrested is to be brought before the Court. There would be a need for Commonwealth and State governments to issue formal and explicit guidelines for the use of these powers of arrest. The Commonwealth and State governments would also need to come to an agreement in relation to State police who made arrests under Family Court orders and injunctions.

Recommendation 39

6.21 *Accordingly, the Committee recommends that:*

Section 114 of the Family Law Act be amended to give a judge a discretion to attach a power of arrest to an order or injunction where the judge:

(i) makes an order or grants an injunction containing a provision relating to the personal protection of the applicant or a child of the marriage, or makes an exclusion order;

(ii) is satisfied that the other party to the marriage has caused actual bodily harm to the applicant or the child; and

(iii) considers that the other party is likely to do so again.

Both the Federal and State police should have the power to arrest in cases where there is reasonable cause for suspecting a breach of the order or injunction by reason of violence or entry into the excluded premises or area. They should be required to bring the person so arrested before any judge or magistrate exercising jurisdiction under the Act within 24 hours and to seek the directions of the court as to the time and place at which the arrested person is to be brought before the court.

Use and Occupancy of the Matrimonial Home

6.22 Decisions[20] of the Full Court have confirmed wide powers to make orders respecting the right to occupy the matrimonial home. Provided there are proceedings between the parties in circumstances arising from the marital relationship, s.114 (1) gives the court wide power to deal with the use and occupancy of the matrimonial home and to make such orders as it thinks proper. This power may be exercised even if the home is solely owned by one spouse and where the other spouse has no legal or equitable interest in the home. Therefore, it is essential that such orders take into account all the circumstances appropriate to the particular case in question and the ultimate determination of the matrimonial property. Where dissolution proceedings are instituted, it is also appropriate that the question of occupancy be considered together with any other maintenance and property issues.

6.23 Matters which are considered in the making of an order include the means and needs of the parties, the needs of children, hardship to either party or to the children, and where relevant, conduct of one party which may justify the other party in leaving the home or in asking for the expulsion from the home of the first party.

ENDNOTES

[1] Section 114 is of greater width than s.124 of the *Matrimonial Causes Act* 1959 because, by reason of s.114 (1) an injunction need not be granted only in aid of principal relief. The power given under s.114 (3) of the Family Law Act is almost identical to that formerly available under s.24 of the Matrimonial Causes Act.

[2] This amendment was enacted as a consequence of the decision of the High Court in *Russell* v. *Russell*; *Farrelly* v. *Farrelly* (1976) FLC 90-039 which held that para (e) of the definition of matrimonial cause in s.4 (1) of the Family Law Act was valid but only in so far as it related to proceedings between the parties to a marriage.

[3] C.C.H. *Family Law and Practice*, para 46-200. However, it is stated in the *Family Law Service* that:
Injunctive relief cannot be sought by way of independent proceedings, against third parties, be they foreclosing mortgagees or adulterers. However, it is no objection that a third party may be adversely affected in an injunction made against a party to the marriage; *In the Marriage of Kalenjuk* (1977) 3 Fam LR 11, 137 it is submitted with

respect that Bell, J. was mistaken in *In the Marriage Walker* (1977) 3 Fam LR 1, 155 in suggesting that an injunction could be granted under s.114 (1) against a third party in order to protect the property right of a party to the marriage. He overlooked the requirement in s.114 (1) that the proceedings must fall within the definition of paragraph (e) ie. that the proceedings for the injunction itself must be proceedings between the parties to a marriage and not merely arise out of them: See *In the Marriage of Page*, unreported, Tonge, J. 1 December 1978. Of course an injunction will lie against the third party by way of ancillary relief under s.114 (3).
(Nygh and Turner's *Family Law Service*, p. 2311)

[4] (1976) 1 Fam LR 11, 592 at 11, 594. See also *Selling* (1979) FLC 90-627.

[5] Vol. 1 para 48,000 of the C.C.H. *Family Law and Practice*.

[6] The width of the injunction powers and the range of topics in respect of which they can be dealt with indicate the crucial importance of s.114. (C.C.H. *Family Law and Practice*).

[7] In early debates on the Family Law Bill it was suggested that an injunction might be granted to restrain a bullying husband from molesting his wife or from using insulting or offensive or humiliating language to her or in front of her; that a violent husband might be prevented from going into his wife's bedroom or even from going into the house where she lives; that an injunction might be granted where the children were being molested or interfered with; that a wife might be prevented from using her husband's credit card.

[8] Senate Standing Committee on Constitutional and Legal Affairs, *Report on the Law and Administration of Divorce and Related Matters and the Clauses of Family Law Bill 1974*. October 1974, para 59.

[9] For example: Tasmanian Police; Office of Women's Affairs; Manly Warringah Women's Resource Centre Limited; Women's Information Switchboard and Women's Shelters, SA; Department of Community Welfare (WA). See particularly, submission to the Committee by the Office of Women's Affairs, especially pages 2-3.

[10] (1976), FLC 90-039.
The Commonwealth was effectively fettered in relation to property until the twelve months separation period had elapsed enabling a ground for divorce to be established, or unless there were proceedings afoot for a declaration of the validity of the marriage.

[11] Early decisions on this matter conflicted:
In the Marriage of McCarney (1976) FLC 90-105 the court held that there is no jurisdiction under the Family Law Act to grant an injunction solely to protect or preserve a prospective right under s.78 or 79 where that right has been invoked before the issue of an application for divorce, nullity or declaration. The effect of this decision was to limit the court's powers to grant injunctions to restrain the dealings with property in the period between separation and the filing of an application for dissolution. However, in *Tansell* v. *Tansell* (1977) FLC 90-280 it was held that the court had the power in appropriate circumstances to protect property rights.

[12] See also *Esmore* v. *Esmore* (1979) FLC 90-711; and *Re Dovey Exparte Ross* (1979) FLC 90-616.
This was an application for a writ of prohibition by the husband whose wife had obtained an injunction restraining him from exercising his voting rights in a company of which he was a director in favour of a resolution to sell or encumber the matrimonial home. The High Court ruled that the Family Court had power to issue an injunction in the circumstances.

[13] Evidence to the Committee by Chief Justice Elizabeth Evatt, 5 July 1979, *Hansard*, pp. 5576-5578.

[14] Paras 197-198.
See also evidence to the Committee by Chief Justice Elizabeth Evatt, 5 July 1979, *Hansard*, pp. 5576-5578; 5725-5726.

[15] However, the court received full submissions on the matter in hand and therefore proceeded to deal with those submissions.
Evidence to the Committee by Chief Justice Elizabeth Evatt, *Hansard*, 5 July 1979, pp. 5725-5726.

[16] Section 114 of the Act has not proved sufficient to protect women and children from domestic violence. Many police are clearly reluctant to enter into 'domestic disputes' and women are often deprived of existing remedies relating to assault and breach of the peace. After securing a non-molestation order under s.114 which is broken, a woman usually has to go back to court for another protection.
The Family Law Council in its First Annual Report rejected a suggestion that the Act should be amended to provide the police with powers to arrest for the breach of an injunction in cases of domestic violence. The Council considered such a provision in the United Kingdom *Domestic Violence and Matrimonial Proceedings Act* 1976, but suggested that existing legislation, if properly used by the legal profession, does afford some protection to women.
If, however the legal profession is not properly using the existing legislation, women are being disadvantaged. Further there appears to be no clear responsibility for ensuring that it is used properly or that the police in such circumstances will act as contemplated by the Council.
Adequate protection of women and children from domestic violence is a high priority and consideration needs to be given to strengthening the injunction procedures under the Family Law Act.
Perhaps the most common problem confronting police officers is the situation where one party to a dispute is interfering with or molesting the other in defiance of an order of the Court. The injured party naturally looks to the police for immediate help in enforcing what she sees as her rights and there appears to be no power in the police to do anything unless a State law is broken. The regulations provide for the arrest and imposition of sanctions against a person found to be in contempt of the Court. In many cases, however, this procedure is of little immediate or practical help. A wife, for example who is being abused or terrorised in the middle of the night by a drunken husband in defiance of a non-molestation order from the Court, must be advised by the police officers she calls to the scene, to consult her solicitor in the morning to arrange for a complaint to the Court; Frequently, the injured party cannot afford continual applications to the Court through a solicitor. I submit that this situation is most unsatisfactory and that some provision should be made in the Act to permit the Court to grant power to the police in the orders it makes to arrest such a person and bring him before the Court to be dealt with..
(Submission from Tasmanian Police Commissioner)

The only thing that I would want to add or reinforce in our submission is that where the court has made an order, I see them as being almost valueless unless there are some provisions included, either in the Act or in the order, or in the warrant itself, which makes it possible for the police, or whoever is to execute the process to see that the provisions of the Court are enforced, to do something there and then when there is a failure on the part of one person or another to comply.
(Oral evidence to Committee from Acting Chief Superintendent of Police Tasmania, Hobart, 16 May 1979, *Hansard*, pp. 3888-3889).
In other oral evidence members of the Victorian Council of Social Service stated that in their view a restraining order can mean nothing and police are reluctant to intervene in what they see as essentially a domestic situation. Further, they were of the opinion that police feel they are without power in such matters. The civil jurisdiction has ousted the criminal jurisdiction and there is no power to arrest (3 April 1979, *Hansard*).

[17] Family Law Council—Annual Reports, 1977-1979. See also evidence to the Committee by Chief Justice Elizabeth Evatt, 6 July 1979, *Hansard*, pp. 5831-5835.

[18] Final Report, vol. 4, chapter 9.

[19] Submission, page 7.

[20] For example, *Davis* (1976) FLC 90-062.

Chapter 7

THE ORGANISATION OF THE FAMILY COURT AND ITS CONDUCT OF PROCEEDINGS

7.0 As a result of the enactment of the Family Law Act in 1975 which became operational on 5 January 1976, the Federal Parliament established a special court known as the Family Court of Australia. This court was charged with administering the Act and was established pursuant to the federal power under ss.71 and 77 of the Australian Constitution which authorises the creation of special federal courts to administer federal laws.

7.1 The Act further provided for the establishment of State Family Courts. The legislation provided States with the option of establishing their own Family Courts (s.41) and State governments were, in 1976, invited to exercise the option. Western Australia is, to date, the only State to have exercised the option.

7.2 The Family Court was set up to exercise jurisdiction under the Act. Section 39(1) of the Act provides for the institution of proceedings being a matrimonial cause under the Act, in the Family Court of Australia, or in the Supreme Court of a State or Territory, while s.39(2) permits the institution of proceedings for ancillary relief in a court of summary jurisdiction of a State or Territory.

7.3 Section 21 of the Family Law Act provides that the Family Court of Australia is to be a superior court of record whose judges are appointed by the Governor-General of Australia, as either senior judges or 'other' judges in such number as the regulations to the Act should prescribe from time to time. Regulations have progressively increased the number of judges permitted to be appointed. The retiring age of judges appointed since 11 October 1977, is 65, following the alteration of the constitution in that year. The judicial function exercised by judges and senior judges of the Family Court of Australia are identical in all respects.

7.4 The Family Court of Australia sits in the following capacity. Under s.31 it has original jurisdiction, exercised usually by one judge, over 'matrimonial causes' which broadly include divorce, nullity, maintenance, custody and property actions. It also has original jurisdiction to grant approval to the marriage of a minor or under age person.

7.5 Single judges of the Family Court have jurisdiction to hear appeals from State or Territory Courts of Summary Jurisdiction acting under the Family Law Act. The Full Court of the Family Court can hear appeals from a single judge of the Family Court of Australia, the Family Court of Western Australia or the Supreme Court of a State or Territory exercising jurisdiction under the Family Law Act. The Full Court can also determine cases stated for its opinion by the single judge of the court. An appeal lies from the Family Court to the High Court by *special leave* of the High Court, or upon a certificate of the Full Court of the Family Court that an important question of law or of public interest is involved (s.95).

7.6 The court was established in September 1975 with the appointment of the Chief Judge and senior puisne judges in each State. The judicial establishment of the court now comprises 40 judges. This does not include the five appointees to the Family Court of Western Australia, who are State appointments, and the Northern Territory

where the jurisdiction under the Family Law Act continues to be exercised by judges of the Supreme Court of the Northern Territory, who are judges of the Federal Court of Australia.

The Family Court Concept

7.7 The establishment of the Family Court of Australia was an attempt to create in Australia a new kind of legal institution. It was a recognition that matrimonial disputes and their settlement required a different kind of approach: one which recognised the relevance of a range of services besides those customarily available to litigants in law cases. This involves attention to the special needs of children and to the possibilities of conciliation in helping those involved in marital breakdown to reach agreements as to how their affairs should be ordered in the aftermath of divorce. In setting up the court a number of international precedents were available.

7.8 The notion of a 'family court' is the result of more than half a century's gestation and practice in the United States of America. Its earliest establishment was in Ohio, where, from 1914 onwards legislation fused juvenile, divorce, bastardy and family-based criminal cases into a single jurisdiction exercised by a special division of the common pleas court, which was called the 'family court' or the 'domestic relations court'.

7.9 The establishment of 'family courts' is a process which has occurred in many developed countries in the last 15 years. The United States of America, Canada and Japan have well established family courts and the United Kingdom is moving towards a unified family law system.

7.10 In countries with operational family courts, these take the form of special courts (or divisions of larger courts) incorporating counselling facilities, not merely to assist reduction of bitterness and distress, but in the alleviation of post-divorce problems. It is in fact the concept of a 'helping court'.

7.11 The proposal for the Family Court of Australia was a recommendation of the Senate Standing Committee on Constitutional and Legal Affairs. The Senate Committee, in its report on the clauses of the Family Law Bill, stated in paras 33 and 34 of its report:

> The Commitee is firmly of the opinion that this Bill requires substantial redrafting to incorporate the creation under the Bill of the Family Court of Australia, a federal court of record, being invested with the full jurisdiction of the Commonwealth under s.51 of the Constitution, (viz. marriage, divorce and matrimonial causes) and dealing exclusively with family law matters. It is proposed that the new Court exercise not only the remedies in relation to matrimonial causes now exercised in State Supreme Courts and Territory Courts but maintenance, custody and family property jurisdictions, presently exercised in a variety of State courts. It is recognised that for some period the present magistrate jurisdiction will need to continue in some districts but it should be phased out over a period.

7.12 The report makes reference to a paper entitled: *An Australian Family Court*, written by Mr R. Watson Q.C. (as he then was) which had assisted the Committee in its deliberation. Mr Watson's paper set out the following argument as to why a Family Court was needed:

(a) extensive changes in Australia's Family Law are currently proposed;

(b) the community is concerned that there are too many divorces—if the family is the lynch-pin of a civilised society, the preservation and protection of marriage is a constantly sought goal of a good society;

(c) therefore marriage breakdown, particularly in its effect on children, is seen as a social ill to be prevented if possible, but otherwise to require social security assistance and community involvement;

(d) there is wide criticism in the community that the present legal system does not deal adequately or effectively with marriage breakdown and that the present system tends to heap indignity on despair;

(e) the increasing recognition that many people whose marriages have failed require more than dissolution of their marriage and legal resolution of related custodial and financial conflicts; Frequently they need ongoing counselling and recognition as persons—not casual judgment that somehow they have failed as spouses and therefore as persons; Their children also frequently need specialised help;

(f) a section of the community now genuinely doubts whether the legal system can provide a humane, compassionate and effective forum for the resolution of such matters of family law as deal with marriage breakdown and the future of children;

(g) State courts do not have the supportive services, the financial endowment or the specially selected judges to grapple with the fundamental questions raised in family law conflicts; Where federal law is involved, State courts frequently suffer from lack of political initiatives for reform at the State government level.

7.13 Mr Watson's paper was placed before the Senate Committee. It summarised the arrangements in force for the administration of family law at the time which it was on the whole the responsibility of State courts. It was proposed that the court should have the following attributes:

- the activities of the court should be seen as a team operation with the various functions of a team 'clearly discerned and discernable';
- the judge must remain a judge not a counsellor—if there is no settlement the necessary judicial decision must be judicial and must be seen as judicial;
- welfare officers and counsellors, though part of the overall team, must be seen to have an independent existence;
- the court counselling service was to be seen as complementary in its work to that of marriage guidance;
- judges should be selected on the basis of their suitability to work in the specified jurisdiction of the Family Court.

The support service of the court was to comprise:

- welfare officers who can talk to parents evaluate custodial difficulties, report to the court, and where required, provide on-going supervision of custody and access orders;
- court counsellors who can counsel in marriage and personality difficulties;
- legal advisers who can inform parties as to their rights and as to the availability of legal aid and other community services.

7.14 It was proposed that the court should sit in specially designed court rooms, that proceedings should be as informal as dignity and propriety would permit and that the court be closed to public and press. It was anticipated that the court would acquire and be capable of exercising powers in relation to family law. Mr Watson's paper concluded:

> The Family Law Bill proceeds upon the basis that the Australian Parliament may make laws relating to all matters flowing from the relationship of marriage, particularly maintenance, property and custody, irrespective of whether the parties are seeking a divorce.

Judges of the Family Court

7.15 It was part of the new image intended for the new court, that the Bench would be staffed by judges who were not only lawyers but well suited to the very specialised work which they would be expected to discharge. Section 22(2) therefore provides that such a person should not be appointed as a judge of the Family Court unless:

(a) he is or has been a judge of another court created by the Parliament or of a State or has been enrolled as a legal practitioner of the High Court or of the Supreme Court of a State or Territory for not less than 5 years; and

(b) by reason of training, experience and personality, he is a suitable person to deal with matters of family law.

7.16 Requirement (a) is a familiar one in the making of State and federal judicial appointments. But (b) is something of a departure and it is designed to ensure that the judges of the court would have the experience and expertise required in this jurisdiction.

7.17 It would appear that high and somewhat unrealistic expectations abound as to the qualities that a Family Court judge should have. One line of argument stresses that judges should be familiar, in some cases trained, in relevant social and behavioural sciences. Some submissions recommend frequent in-service training so that the judges may be up-dated with the latest findings of the social scientists. It is agreed that judges should be open and sympathetic to learning from disciplines other than their own. However, they are appointed as judges and must therefore preside and adjudicate. Court counsellors are available to supply the social science input into the court and it is considered that the judges should co-operate rather than compete with the counsellors.

7.18 Some submissions to the Inquiry draw attention to apparent anomalies in the creation of a federal jurisdiction in family law exercised by judges appointed at a more junior level to that of their brethren on the Federal Court. It is noted for instance that this precludes the ready transfer of a judge of the Family Court to other federal courts. Such a judge would need to be promoted in status if such a transfer were to occur. Some submissions have noted difficulties that could arise in the future because of this want of flexibility. For instance, if a judge proves unsuitable as a family law judge he cannot be easily moved to an area more suited to his abilities. Because appointments are governed by the Constitution, a judge of the Family Court is an appointment for life if appointed prior to 11 October 1977 (or age 65 if appointed after that date), removable only on an address under s.72 of the Constitution. The Constitution also precludes acting appointments being made or the appointment of persons at less than full judicial status. This problem can be overcome either by raising the status of the Family Court bench to parity with other Federal Judgeships by making it a division of the Federal Court or by the appointment of judges or magistrates by the States to a notional family court, or the creation of State Family Courts under s.41. The decision to create a separate court was quite deliberately made, however. It was considered that the qualities and attributes of Family Court judges and the nature of the court in which they were to preside, required the establishment of a specialist court. A court, moreover, which would provide a bridge between the jurisdiction previously exercised by the Supreme courts in divorce matters and State courts of summary jurisdiction. The Committee regards this policy consideration as still valid and does not support the

creation of a Family Court division within the Federal court structure. Such problems as might arise point to the importance of selecting judges of the Family Court because they have already indicated interest and aptitude for the task. It does point to the need, however, to keep federal appointments to the bench to the minimum. It is necessary to avoid making judicial appointments if other solutions to the problems of the court can be found. There are two ways this can be done. The first is to ensure that the court is properly staffed with registrars so that the conciliation intentions of the Family Law Act can be realised. The second is the co-operation of the States in supporting the court by making appointments of judges under a dual court scheme with the double aim of extending the jurisdiction of the court to include as wide a range of family law matters as possible and to relieve work load for the judiciary by taking advantage of the greater flexibility.

7.19 Although there are some difficulties in maintaining a specialised jurisdiction it is considered that the problem can be exaggerated. The family law jurisdiction takes in a wide area of the general law. A competent practitioner would certainly need to be well versed in all areas of commercial and property law. Specialised tribunals are a feature of State as well as the federal jurisdiction. Specialisation, particularly at the bar, is an increasing feature of the organisation of the legal profession. It is quite common for practitioners to spend a life time in specialist work of one kind or another in the law. It is considered a strength rather than a weakness that a pool of able specialists be available from which judicial appointments can be made. The Committee has noted with concern the rather contemptuous attitude adopted by some legal practitioners to family law. This is reflected to some extent in legal education. Family law is not a compulsory but an optional subject in most law courses. As it constitutes some 25 per cent of the practice of the average suburban solicitor it is apparent that it is an area of some considerable importance to potential clients, a fact which law schools and law societies should have regard to when determining the prerequisites for legal practice. It is encouraging to note the appearance of post-graduate courses such as the one recently established at Monash University in the family law area. Also, the existence of bodies such as the Family Law Practitioners' Associations are to be welcomed. Membership of such bodies by a practitioner is at least some indication to clients and legal aid authorities that a member has at least an interest in the field and may have achieved some competence. The Committee is encouraged that many men and women of high quality have accepted appointment to the Family Court Bench. It is hoped that the court will attract men and women of calibre both as practitioners and judges.

The Establishment and Operation of the Family Court

7.20 The establishment of the Family Court is an initiative that appears to have won support from the consumers of the court's services, from the officers of the court themselves and from the legal profession. In their submission to the Inquiry the judges of the Family Court stated:

> On the whole, the Family Court of Australia is functioning well and is achieving the aims of the Family Law Act. In human terms, the trauma, the bitterness and the humiliation which were so often a feature of divorce proceedings under the former law have been minimised. Even in the often contested areas of custody, property and maintenance, the interdisciplinary approach of the Court, involving both the Judges and the counsellors, has helped parties to come to terms with their bitterness and hostility and in many cases to reach agreement about disputed matters.

7.21 Nevertheless, the court has experienced some difficult problems. The Family

Court judges, in their submission, informed the Committee that since January 1976 when the *Family Law Act* 1975 came into operation, the work of the Family Court has grown far more rapidly than the court's capacity to deal with it. The main build up has been in contested applications for custody, property and maintenance. Only a small proportion of the court's time (around 5%) is spent on applications for dissolution; these have been dealt with at a constant rate and substantial delays have not accumulated. The decline in the number of applications for dissolution since 1976 has not significantly improved the court's capacity to deal with other applications.

7.22 The number of applications for custody, property and maintenance and other matters has not slackened since January 1976 but has remained at the same rate.

Applications (by subject)	*1977*	*1978*	*1979*	*1980 (to 30 June)*
Custody	8623	7913	6998	3701
Access	3778	3393	3309	1872
Property	7372	8625	8357	4244
Maintenance	8568	8092	6826	3815
Injunction	2727	2991	3141	1825
Total Applications for relief (by subject)	31068	31014	28631	15457
Total Application Forms (which may include more than one subject)	(21288)	(21620)	(23208)	

While the number of applications has come in at a steady rate since January, 1976, the court's resources have been built up comparatively slowly. The number of judges at different stages is set out in the following table:

	No. of Judges appointed	
by 31 January, 1976		7
31 March	+10	17
30 June	+ 4	21
30 September	+ 2	23
31 December	+ 2	25
by 30 June, 1977	+ 5	30
31 December	+ 6	36
by 30 June, 1978	—	38
31 December	+ 2	38
by 31 December, 1979	+ 2	40

By the second half of 1976 the court had accumulated a substantial backlog. Even by this time judicial strength was well below the present figure. There has been no decline in the volume of work. As a result, the arrears, far from disappearing, have grown larger. Not all registries have been affected in the same way. The smaller registries have been better placed to prevent the build-up of arrears. The registries most adversely affected have been Sydney, Melbourne and Brisbane.

7.23 Arrears of work means delays for parties and additional costs. They also lead to a greater burden of work because of the need to have interlocutory proceedings and interim orders in matters which are unlikely to be heard for a long time. This adds further to the delays and the costs.

7.24 The build-up of staff in the court has also been relatively slow. While all sections are affected, the area which calls for special consideration in this Report is that of the pre-trial conciliation procedures, which are the responsibility of the Court

Counsellors and Deputy Registrars. It is in the development of this aspect of the court's work that proponents of the Family Court see the contribution of the court to a more civilised and economic solution to marital problems.

7.25 We will have occasion to note later, when the Committee discusses the work of the court counselling section, that counsellors have not been employed in sufficient numbers for intervention to take place at a sufficiently early stage to be effective. Effectiveness is to be measured in terms of an overall reduction in the number of matters that become contested proceedings. It would appear to the Committee that there are far too many cases that are entering the contested list of the court. This has given rise to delays which are themselves the cause of matters becoming contested by reason of the fact that officers of the court are engaged in dealing with contested matters and are not available at an early stage to provide the conciliatory services which the court was established to provide.

Appellate Jurisdiction

7.26 Single judges of the Family Court have jurisdiction to hear appeals from State or Territory courts of summary jurisdiction acting under the Family Law Act. The Full Court of the Family Court can hear appeals from a single judge of the Family Court of Australia, the Family Court of Western Australia or the supreme court of a State or Territory exercising jurisdiction under the Act. A single judge of the court can state a case for opinion of the Full Court where an important point of law is involved. An appeal lies from the Family Court to the High Court by special leave of the High Court, or upon a certificate of the Full Court of the Family Court that an important question of law or of public interest is involved (s.95).

7.27 The Full Court of the Family Court usually comprises three judges sitting together. Panels can be composed to include any Family Court judges, but the panel generally includes the Chief Judge or one of the senior judges. The Full Court would normally sit in the following places to her appeals:

Sydney	11 weeks
Parramatta	1 week
Melbourne	8 weeks
Brisbane	5 weeks
Adelaide	3 weeks
Perth	3 weeks
Hobart	2 weeks
Canberra	2 weeks

The sittings in any city are not consecutive but are spread throughout the year.

7.28 Appeals under s.94, from a judge of the Family Court sitting alone, to the Full Court in 1976 and 1977 were:

	1976	*1977*
No of appeals filed	235	317
Heard*	183	228
Withdrawn	50	73
Dismissed by consent	2	5
Not yet heard	—	11

* This includes some appeals which were settled after being listed for hearing

Subject of Appeals:

Custody	77	107
Access	3	8
Maintenance	57	82
Property	80	98
Rescind Decree	14	13
Costs	1	8
Contempt	3	1
	235	317

The number of cases listed in Table 1 as 'heard' includes matters which were listed for hearing but which were disposed of without a full hearing on the merits. The actual number of cases fully heard were as follows:

1976—157
1977—193

7.29 One of the problems that arises in regard to appellate jurisdiction is the comparative frequency of conflicting decisions of the Full Court. This is due in part to the varying composition of the Full Court Bench. It is the responsibility of the Chief Judge to determine the composition of different Full Court Benches. As there are forty judges of the Family Court the potential for a range of views on matters the subject of appeals is very high. This has led to the recommendation that there be a permanent appeal court. The Committee does not think that at the present time there should be any interference with the power of the Chief Judge to determine the composition of the Full Court Bench. It is not in favour of the appellate jurisdiction being elevated to Federal Court level. But it is considered that a reduction in the size of the pool from which appellate judges can be drawn in the interest of greater consistency of decisions and thereby certainty in the law.

Recommendation 40

7.30 *It is recommended that there be a pool of 10 Justices from which judges are drawn to constitute Full Court Benches. Six of these judges would be permanent members. The remaining 4 positions would rotate being filled by other justices on the basis of seniority from time to time.*

7.31 It has been submitted by the Government of Western Australia that steps should be taken to confer federal commissions on the judges of the Western Australian Family Court to enable them to participate in the appellate work of the court. The Committee agrees that judges of that court should be included in the appellate work under the Family Law Act.

Recommendation 41

7.32 *It is accordingly recommended that the Attorney-General pursuant to s.22(2A) of the Family Law Act grant federal commissions to the judges of the Family Court of Western Australia.*

7.33 In this connection it should be noted that if judges were granted federal commissions it would enable them to sit, if required, in the exercise of jurisdiction under the Family Law Act in any part of Australia. It would not, however, be possible for judges not granted Western Australian commissions to exercise jurisdiction under the *Western Australian Family Court Act* 1976.

Services Provided in the Family Court for Minority Groups.

7.34 A division of clients in the Family Court into Australians and migrants is both

misleading and unhelpful in trying to determine the range of services and facilities which should be provided to people of diverse historical, social, religious and educational backgrounds. Although there is really no way in which the isolated characteristics of each group can be catered for separately and although Australian law and legal procedure must prevail, there are means by which the backgrounds of the parties involved can be taken into account and given some weight along with other relevant factors.

7.35 In evidence to the Committee, several areas have been highlighted where the services of the Family Court could be improved thereby avoiding unnecessary legal and personal expenses for people with a limited knowledge and understanding of the Australian legal system.

Use of Interpreters and Translating Services

7.36 At present, there are no interpreters specifically attached to the Family Court. The difficulties associated with this lack of such a service was highlighted by one witness to the Inquiry who is a social worker.[1] She stated that a migrant person who has to attend court is in a position where the services of a friend must be enlisted if the person cannot afford the fees of an interpreter. The haphazard nature of this kind of arrangement also raises the issue of control over the quality of the interpreting services provided.

7.37 The Department of Immigration and Ethnic Affairs, in appearing before the Committee,[2] pointed out that interpreters engaged by the Department did operate in the Family Court but that there was no formal connection between the Department and the Court:

> Interpreter/translators are now essential components of Family Court operations. Departmental linguists of the Telephone Interpreter Service and the Translations Section have assisted the Family Court in its activities and this is expected to continue for some time. Nevertheless, very few departmental linguists have a specialised knowledge of the legal field, particularly in relation to the Family Court and its supporting legislation. Arrangements satisfactory for the long term should try to ensure that skilled and accreditated interpreters/translators are available in a more direct relationship to the Court.[3]

7.38 The Department also made reference to the activities of the National Accreditation Authority for Translators and Interpreters which should ensure proper standards of practice in this field.

7.39 The Commissioner for Community Relations raised the problem of using a second language in the emotional and tense courtroom situation where fluency and clarity of expression assumed great importance. Moreover, he stressed the point that ". . . the laws of Australia in relation to Federal and State jurisdictions do not provide an absolute right of an interpreter".[4]

Recommendation 42

7.40 In view of all the points raised earlier and the potential saving in court time the *Committee recommends that interpreter services be made available to parties who so require it. Any such interpreter should have full accreditation.*

Counselling Services

7.41 One criticism from migrant community groups is that there is a general lack of

knowedge demonstrated by counsellors, lawyers and judges of the cultural background of the people who appear before the court. This means that people are inadequately advised of their position under Australian law and how this may affect them under the laws of their country of origin. Cases have been cited both by the Commissioner for Community Relations and the Department of Immigration and Ethnic Affairs where divorces and marriages granted in Australia have not been recognised in the native country of the parties and where this has led to problems for the parties concerned and their children. It has also been stated in evidence that rulings have been made on complex questions of custody, property and maintenance without taking into account the social and cultural implications of these judgments for someone from a different society with different codes of conduct and different community and family support systems.

7.42 The Principal Director of Court Counselling of the Family Court has indicated that there is an attempt being made to encourage all counsellors to learn a second language.[5] The recruitment policy of the court is also reflecting the acknowledged need for bilingual counsellors and there is now positive recruitment of counsellors with language skills appropriate to the area where the court is located.

7.43 There is the added complication that the facilities and procedures within Family Courts and elsewhere (i.e. voluntary marriage guidance organisations) are not easily understood and the need for clarification is often overlooked by court counsellors, officials and legal practitioners. It is desirable that both parties to a divorce be aware of the status of counselling, and the effect it has on their position. Furthermore there is a need for clarification about the role of marriage guidance counsellors and their status in relation to the court and its processes.

Recommendation 43

7.44 The Committee therefore *recommends that the Family Court recruit people with a sensitivity and experience in working with the major ethnic communities residing in the area where the court is located.*

Community Information and the Media

7.45 The lack of accessible information regarding the services available through the Family Court and voluntary marriage guidance organisations has reduced the benefit and use made of the conciliation processes. The greater need for information generally has been acknowledged in the Report of the Review of Post-arrival Programs and Services for Migrants under the Chairmanship of Mr F. E. Galbally. The Galbally Report recommended increased use to be made of ethnic broadcasting services to disseminate information as well as the funding of a survey to determine migrants' information needs. The Government has endorsed these recommendations and is working towards the establishment of migrant resource centres throughout Australia.

7.46 Information pamphlets about the workings of the Family Court have been produced by the Department of Immigration and Ethnic Affairs in eight languages. However, witnesses appearing before the Committee have indicated that there is still a great need for more information about family law and the workings of the Act. One witness[6] made reference to the fact that no information had been disseminated to the community about marriage guidance officers or voluntary family counselling services, such as those provided by church-based groups. The Department of Immigration and Ethnic Affairs stressed the greater use of the ethnic media, ethnic press, ethnic radio and the developing ethnic television as well as distribution of information direct to

ethnic organisations. It was stated that ethnic radio was an especially effective medium to reach ethnic communities.[7]

Recommendation 44

7.47 The Committee *recommends that a wider range of explanatory documents in the major language groupings be prepared in all areas of the courts' operations, particularly on counselling and specific areas of the Act such as custody, maintenance and property. It is further recommended that wider publicity is given in the major languages, to the services provided by voluntary marriage guidance organisations.* This may be done through ethnic radio and television. Greater use of media channels is strongly encouraged.

Conciliation Procedures

7.48 Regulation 96 provides that the court may order a conference to be held before the registrar to enable the parties to confer and make a *bona fide* endeavour to reach agreement on matters at issue between the parties. Approximately 75% of all conferences result in an agreement, thus obviating lengthy hearings before the court. Registrars and deputy registrars all become involved in conferences.

7.49 Where the determination of a matter requires the court to be informed as to the financial situation of the parties (maintenance and property settlement actions), a considerable amount of court time is involved in:

(a) determining the current financial situation of the parties in respect of income;
(b) determining the current expenses of maintaining the wife and children of the marriage;
(c) delving into the contributions made by each party in acquiring the assets of the marriage;
(d) ascertaining the true financial situation of the parties where one or both parties have been in self-employment. In this situation the business could have been a partnership, limited liability company or a sole owner business. In these circumstances the annual accounts do not usually disclose the true situation. Additionally hidden within the accounts could be various 'fringe benefits' transactions which hide the true income or asset value of the business.

7.50 Much of this investigatory work can be done just as capably by a legally qualified person as by a judge. A considerable saving of judicial time can be effected due to this preliminary work being carried out by the registrars. Registrars must submit to the court their findings on the facts. These reports then become evidence, albeit rebuttable evidence of the facts contained therein.

7.51 Considerable importance is attached by the Committee to these pre-trial procedures and counselling. We discuss counselling in chapter 10. At this stage it is sufficient merely to note that in registries of the Family Court the counselling section is engaged mainly in work involving custody and access. However, it should be recognised that because of the nature of the counselling process, which leads to attention being focussed on the interpersonal relationships of the parties there is considerable potential for the relationships between the parties to be improved sufficiently for them to reach agreement on other aspects of the relationship, including questions of property and support. But where there is a dispute concerning the financial relations of the parties it is the registrar who performs the conciliation

function. Whilst there is evidence that proceedings before registrars can be successful, the operation of this part of the court's work is hampered by insufficient staff.

7.52 The Family Law Council in its Second Annual Report in commenting on the delays being experienced and the reasons for them went on to say:

> In the light of this situation and in view of restraint imposed in regard to the growth of the Court, attention needs to be given to ways of reducing the number of cases which come on to a fully contested hearing. The view of the Court administration is that there are two successful means which can be employed:
> - conciliation conferences with Court counsellors under s.62(1) in cases concerning children;
> - conferences with a registrar or deputy registrar under reg. 96 concerning particularly property and maintenance matters.
>
> These methods have proved successful in reaching settlements or at least in narrowing considerably the issues between the parties. The Council has been informed that regulation 96 conferences in some registries have about a 75% success rate. More effective use of both these procedures could be made if Court Counsellors had more time available for conferences, especially at an early stage, and if more deputy registrars could be appointed. At present Court Counsellors spend a high proportion of their time in preparing reports for the court under s.62(4). While this is important it should not preclude Court Counsellors from conference and conciliation work.
>
> The number of registrars and deputy registrars at present available for conference work under reg. 96 and for reporting under reg. 99 is 15 and 2 in Western Australia. Although there have been some criticisms of the functions exercised by Deputy Registrars, the Council considers that the registrar's conference is an important development with potential benefits for parties and the Court.
>
> The Council has referred to the Regulations Committee the question of the role of registrars and deputy registrars in property and maintenance cases. Among the matters to be considered is whether the registrar should have power to make a recommendation.

7.53 In the Family Court of Western Australia considerable use is made of pre-trial procedures. The court in its submission to the Committee stated:

> Regulation 96 provides for a conference to allow the parties to make a *bona fide* endeavour to reach agreement on matters in issue between them. Legal representatives may be allowed and the Court may order the conference in the presence of a Registrar or an officer of the Court. These conferences have been a feature of the listing procedure of this Court since commencement. Such a conference is ordered wherever practicable. In cases where one of the parties lives a great distance from the Court, the conference is usually ordered within a few days prior to the trial. These conferences are held in all cases under the Act except defended divorce and contempt, but including matters involving the welfare of children. Thus, in welfare cases the parties almost invariably attend a conference with a Court Counsellor at an early stage of the proceedings and pre-trial conference before trial.
>
> The practice of this Court is that parties are always entitled to have legal representation at the pre-trial conference, and are encouraged to do so.
>
> The pre-trial conference or Regulation 96 conference has been an outstanding success in this court. Over the 31 months of the Court's existence to 31 December 1978, the statistics show that two-thirds of all defended matters got no further than a pre-trial conference. Of the one-third which were sent on to either the short cause or the long cause list, a further proportion were settled. In addition, of the matters that proceed to trial a number of issues have been settled, thus reducing the hearing time. Apart from the question of the settlement of issues, the pre-trial conference is a very useful procedure to ensure that if the matter is to proceed to trial it is ready for trial, thus reducing the waste of judicial time because of unnecessary adjournments.

7.54 The evidence available to the Committee suggests that the appointment of more staff to the registries of the court should be preferred to the appointment of more

judges as an initial step in reducing the back-log. This was the conclusion of a recent study of the Melbourne Registry of the Family Court which is the registry that is experiencing the most serious back-logs and delays. It was noted in this study in relation to the appointment of judges:

> Indications are however, that under existing strategies, the present strength of ten judges is unable to make any significant inroads into the back-log of defended matters.
>
> Recent public statements by the Victorian Bar Council and other representative legal bodies have argued that there is a need for the appointment of at least 4 additional judges. Each judicial appointment creates the need for the appointment of certain support staff to enable the court to function (1 Court Orderly, 1 Personal Secretary, 2 Reporters) as well as professional staff to carry out the Judge's orders for counselling and Regulation 96/99 interventions (2 Counsellors and the partial services of a Principal Legal Officer). Ignoring the PLO, the Review Team estimates that the cost would be approximately $980,000 p.a. (using a 74% overhead allowance).
>
> Besides a high cost, the pursuit of this strategy suffers from a further disadvantage in that judicial appointments are permanent. Once the backlog is removed judicial resources would exceed workload.
>
> There is scope however, for an alternative strategy that would:
> - reduce the number of matters flowing into defended lists; and
> - attack the backlog indirectly.
>
> In simple terms, the alternative approach would attempt to give existing judges more time to tackle backlog by reducing the number of matters now flowing into the defended lists. The Review Team considers that there is scope to reduce the number of defended hearings by expanding the use of conferences as a means of achieving consent agreements.[8]

7.55 It is the view of the Committee that, where appropriate, a re-allocation of staff resources between registries or into new registries may achieve some improvements in efficiency. The Committee considers that the appointment of more registrars is an essential first step and should be the initial thrust in attempting to deal with backlogs. This does not preclude the appointment of more judges. As the Family Court judges in their submission commented:

> The appointment of more Judges or the appointment of Court Counsellors, Registrars and other staff are not necessarily alternatives; a combination of these options may be desirable though each has different consequences.
>
> The appointment of three or four additional judges might enable the Court to tackle some of the arrears of contested work, or at least to slow down the rate of accumulation. To enable a significant reduction to be made in the arrears of work, at least 8-10 further appointments would be necessary. There would be some disadvantages in the latter course. The appointment of a Judge is a permanent appointment, to the age of 65; it is not possible to appoint temporary or acting judges. Each additional appointment brings with it the need to appoint at least four other staff (1 secretary, 1 orderly, 2 court counsellors) as well as increasing the need for Commonwealth Reporting Services on a daily basis. The judges deal mainly with contested matters and are not usually directly involved in pre-trial conciliation procedures.
>
> The appointment of more Court Counsellors, Deputy Registrars and other staff would enable the Court to expand its pre-trial conciliation procedures to operate more efficiently, especially in the larger registries. The functions of Registrars and Court Counsellors are described in the material put to the Committee by the Principal Registrar and are not repeated here. Court Counsellors and Deputy Registrars deal with matters before they reach the contested lists. The advantage of these procedures is that the final settlement of matters at this stage is less costly for parties, and helps them to avoid the trauma of the court hearing. It is also less costly to the legal aid funds. While the appointment of Court Counsellors and Deputy Registrars would create the need for some additional staff services, it would represent a more flexible use of resources to meet a situation of accumulated arrears of work, because the number of staff need not be kept at the same level, but could be reduced in time if the work load diminished.

Recommendation 45

7.56 *The Committee recommends (i) that pre-trial proceedings should be mandatory in all disputed cases involving child custody or access or financial relationships other than those of urgent necessity and (ii) that the Department of the Attorney-General in association with the Principal Court Registrar undertake immediate studies to determine the number of deputy registrars that would be required to ensure that pre-trial proceedings are available in respect of every disputed matter involving either child custody or financial relationships and that the Public Service Board facilitate these appointments as a matter of urgency.*

7.57 The supporting staff of the registries will need to be increased commensurately to ensure that the registries are able to perform their duties effectively. Another matter which is considered in more detail later is the relationship between the conciliation work of the court and the work of magistrates. This is discussed later in the chapter.

Size and Location of Registries

7.58 For the Family Court to work effectively it is important that the services provided be readily available. This is particularly the case in regard to conciliation services provided by the court counsellors and court registrars. Currently, the court is organised, regionally, into a number of registries located mainly in the centres of big population. Apart from Western Australia and the Northern Territory, where special considerations apply, registries of the court have been established in each State capital city. However, in New South Wales there are registries of the court in Canberra, Newcastle and Parramatta as well as in Sydney. In Queensland there is a registry located at Townsville as well as in Brisbane. In Tasmania there are two single judge registries only. In Victoria, one registry is located in Central Melbourne and in South Australia, one registry is located in Adelaide. Judges go on circuit to major centres of population and rural areas. Evidence to the Committee suggests that the Family Court faces different problems in different States. Some of these problems arise from the geography of the State. Queensland, for instance, because of its vast area and scattered population has special needs. New South Wales is the best served State, as far as accessibility to services is concerned having two registries of the court in greater Sydney, Newcastle, and a registry in Canberra which serves the South East region of New South Wales, the Riverina and the Monaro districts. The major problems have been encountered in Victoria with one large registry located in Melbourne. It is this registry that has been experiencing the most serious problems with extremely long delays being reported in relation to all contested ancillary matters. A Staff Utilisation Review was carried out in 1979 in relation to the Melbourne Registry.

7.59 Problems of co-ordination and managing a registry the size of Melbourne were raised throughout the Review. The possibility of decentralisation was raised in both the context of these problems and as a strategy for future expansion if required.

7.60 The following Table taken from the Review gives an overview of registry workloads. Form six is an application in relation to ancillary matters such as custody and property.

1978	*Melbourne*	*Sydney*	*Parramatta*	*Adelaide*	*Brisbane*
No. Form 6's Filed	6567	3825	2665	2165	2936
No. of Judges	10	8	4	5	6
Total App'n/Judge	657	478	666	432	489
Operative Staffing Level as at 31/12/78	77	68	42	43	48
Support Staff per Judge	7.7	8.5	10.5	8.6	8.0
Applications per Support Staff	85.89	56.65	63.45	50.28	61.17
Trend in Applications Filed over Previous Year	Increase +13.8%	Decrease −18.8%	Increase +3.9%	Decrease −19.9%	Decrease −17.9%

7.61 It would appear that decentralisation strategies will be required in Victoria as it would not appear that expansion of the existing registry is the answer to the backlogs and delays being experienced in that court nor would the answer appear to lie in the creation of new registries with resident judges along the lines of Parramatta in NSW. Creation of new registries is not a solution to the problem of creating more immediate access to the services provided by the court if it means having judges located at rather than merely visiting the registry. The most viable solution would appear to be the creation of smaller branch registries staffed by a deputy registrar and supporting staff, plus supporting clerical and counter staff. Judges from the central registry would then visit and sit from time to time to hear these matters that continue to be contested after the conciliation process. It must be obvious that it is considerably more economic to direct money toward the appointment of additional registrars rather than judges. It would also reinforce one of the main objectives of the Family Court system which is to emphasise the conciliation and negotiation approach and de-emphasise adversary court procedures. These branch registries would be located in rural areas so as to provide continuing service to clients in conciliation. Contested matters could be dealt with by the court on circuit.

Recommendation 46

7.62 *The Committee recommends that studies be undertaken with a view to establishing branch registries consisting of deputy registrars and court counsellors in rural areas and areas of large population not adequately served by the existing registries of the court and that the Government make the necessary resources available as a matter of urgency. These studies should also investigate the extent to which a re allocation of resources within or between existing registries may alleviate some of the present staffing shortages.*

Circuit Sittings

7.63 As well as attending permanently established courts, judges go regularly on circuits to country towns in each State. In arranging circuits, State boundaries are not taken into account and the nearest registry services a region. An example is shown below:[9]

REGISTRY	*TOWN*	*NUMBER OF DAYS*
From Parramatta	Bathurst/Orange	10 days
	Wollongong	12 days
From Canberra	Wagga	15 days
From Brisbane	Lismore	15 days
From Adelaide	Broken Hill	3 days

7.64 When the court proceeds on circuit, a deputy registrar or registrar and one or more counsellors also accompany the judge to undertake conferences under regulation 96 or s.62(1).

Recommendation 47

7.65 It would clearly be preferable and is *recommended that branch registries be permanently located in centres visited by the Family Court on circuit so that the work of the court can continue in a regular way, pending the periodic visits of the Judges.*

The Atmosphere of the Family Court

7.66 The perception of the Family Court as a helping court resulted in the creation of an atmosphere appropriate to the nature of proceedings in family law matters. In designing the interiors of court rooms and the precincts of the court an attempt has been made to avoid the intimidating atmosphere associated with courts. Thus, judges and advocates are neither robed nor bewigged in court and the fittings and furniture have been designed to create a relaxing atmosphere. Although some submissions from lawyers have lamented the passing of the paraphernalia of justice these changes have been largely welcomed by the public. The Committee supports the policy of creating a less formal atmosphere in the Family Court jurisdiction than in other jurisdictions.

The Family Court Procedures

7.67 There have been a number of matters raised in the course of the Inquiry relating to the procedures applicable in the Family Court. Some of these matters have been touched on elsewhere in the Report in relation to general matters such as grounds for dissolution, custody and property. The following matters require further comment:

Joint Application for Divorce

7.68 Currently, an application for dissolution or nullity can be filed by either party to the marriage and will proceed on the payment of the prescribed fee of $100. There is some support for the proposal that it should be possible for a joint application to be lodged by more than one party to the marriage. This would enable the cost of a dissolution application to be shared by both parties who could even employ the same solicitor. It would constitute a memorandum or record of the agreement that the parties had reached regarding such matters as custody, maintenance and property distribution. The costs of some procedural matters such as service of the process would be saved and the filing fee would be shared. The availability of such procedure would be helpful to parties agreed upon a divorce in seeking advice on the resolution of matters. It would save one party having to accept the stigma of being the respondent in the proceedings. It would emphasise that proceedings need not be adversary and would encourage negotiation and conciliation.

7.69 Section 44 of the Family Law Act provides that 'subject to this section, proceedings under this Act shall be instituted by application.'

Recommendation 48

7.70 *The Committee recommends that the necessary amendments to procedures be made to enable parties who wish to do so to file joint applications for dissolution.* Amongst the matters such proceedings should cover would include, in relation to any deed, the extent to which both parties had been independently advised.

7.71 With the concept of a joint application there is one question that arises, and that would need to be covered by a regulation. This matter is that parties should have independent advice when they are tendering a deed at the same time as they are getting a divorce, as it is considered undesirable for one solicitor to advise both parties on a deed.

7.72 Other problems might arise if parties' interests began to diverge. An applicant would then have to proceed separately and this would need to be worked out in a regulation. Some of these problems have been noted by the Family Law Council. In the Third Annual Report (p.9 para 50) it was stated that the Council had decided against joint applications on the ground that to do so might introduce unnecessary complications and possibly lead to manipulation of one party by the other. The matter was raised with Justice Elizabeth Evatt, when she appeared before the Committee on 29 November 1979. In her capacity as Chairman of the Family Law Council, Justice Evatt undertook to bring the matter to the attention of Council members and to supply the Committee with more detailed reasons for the Council's objection to joint applications. Justice Evatt wrote to the Committee on 17 December last, advising that the matter has been raised in the Family Law Council. It appears that Council members see practical problems with the proposal. For example:

- a solicitor could not act for both parties without changing the general rule of ethics. If a solicitor acted for one of the parties there might be anxiety that the other party had not been independently advised of his or her rights;
- unless both parties were present when the application was filed, some provision would need to be made to notify parties of the hearing date and for service of any further document.

7.73 Justice Evatt in her evidence to the Committee said that she was in favour of joint applications and thought that practical problems could be overcome. We agree with Justice Evatt.

Consolidated Hearings

7.74 As mentioned in chapter 3 the Committee concludes that where possible all matters at issue between divorcing parties should be settled before the decree of divorce. The best way to achieve this is for the matters to be dealt with during the 12 months separation period. In order for this to be achieved in the most satisfactory manner it will be necessary:

- to deal with the accumulated matters constituting the present backlogs so that counsellors and registrars will be available to undertake conciliation procedures along the lines recommended in this report;
- for the States to refer powers to the federal government to enable matters connected with property to be dealt with in the separation period.

As a result access to the services of the Court will be available early enough for the parties to be assisted in conferring and resolving the matters at issue between them at the best time which is as early as possible after they have separated. As noted elsewhere in the report if reconciliation is to be achieved it is at this stage that it has the best chance. Once these alterations have been achieved it might then be possible to make procedural provision for a consolidated hearing.

7.75 Consolidated hearings recognise that the separate issues between the parties are related. The decision of who has custody of the children is likely to be a vital consideration in deciding who is to occupy the matrimonial home and under what

conditions. It would mean that a case would need to be prepared fully before a dissolution application is filed. This would discourage dilatoriness on the part of the applicant.

7.76 It should be emphasised, however, that the Committee is opposed to procedural changes that would make the divorce decree in all cases dependent on the resolution of other issues until the court services are improved to the point where all matters, ancillary and principal relief, can be dealt with in a reasonable period (no more than 3 months) after the separation period has elapsed. Even then it is considered that there will be circumstances where it might not be appropriate for a consolidated hearing to take place.

Simplified Procedure in Undefended Dissolution Applications

7.77 It has been recommended by both the Family Law Council and the Commonwealth Legal Aid Commission that the procedures which apply to the United Kingdom in respect of undefended dissolutions should apply in Australia. The recommendation put forward by the Family Law Council in its First Annual Report is that:

(1) it is appropriate for the court to deal with undefended divorce applications on affidavit evidence;

(2) the court could call for further information or direct that there should be a hearing and either party could choose to have a hearing (First Annual Report, 1977).

7.78 The effect of this proposal would be that where the material on file satisfies the court that it is proper to grant a *decree nisi*, the court can do so, thus relieving the parties of the need to attend court either in person or by legal representative. It would be open for either party at any stage to require a hearing. This procedure has proved effective in England. It was introduced on a limited basis in 1973. Since 1977 the system has been extended and now applies to divorce petitions on all grounds whether or not there are children of the marriage. The system as it applies in the UK was described to the Committee in the following terms:

1. Petitioner obtains a copy of marriage certificate.

Where petitioner asks solicitor to draft petition etc.,

2. Petitioner, having received solicitor's advice, checks draft petition and any statement as to the arrangements for the children carefully.
3. Petitioner signs the petition and statement (if any) and obtains two extra copies of each completed document (at least three extra copies of a petition alleging adultery). TURN NOW TO STEP 7.

Where petitioner decides to draft petition etc. personally

4. Petitioner obtains from court office:
   (1) three copies (four for an adultery petition) of the standard form of petition;
   (2) a copy of the notes for guidance about completing the petition;
   (3) in children cases, three copies of the standard form of statement of arrangements for the children; and
   (4) a copy of a booklet.
5. Petitioner studies the forms; reads the notes and the booklet.
6. Petitioner fills in draft petition form and, where appropriate, forms of statement of arrangements for children; signs and dates forms; makes identical copies for the Court and retains copies for personal use.

7. Petitioner selects Court.
8. Petitioner starts proceedings by filing the following documents in the court office:
   (1) the signed petition and copies for service by the Court on the respondent and co-respondent (if any);
   (2) where appropriate, the signed statement of arrangements for the children and a copy for service by the Court on the respondent;
   (3) the marriage certificate;
   (4) the court fee of 20 pounds (unless exempt).
9. Petitioner retains copies of all documents (except marriage certificate).
10. Court allocates case number and posts to respondent:
   - copy petition;
   - if there are children, copy of statement of proposed arrangements;
   - notice of proceedings; and
   - form of acknowledgement of service.

also sends documents (1), (3) and (4) to any co-respondent.

On receipt from respondent (and co-respondent) of signed acknowledgement of service, court office sends to petitioner:
   (1) photocopy of acknowledgement of service;
   (2) form of request for directions for trial;
   (3) appropriate standard form of affidavit of evidence.

Petitioner fills in appropriate form of affidavit of evidence and takes it, together with the photocopy of the acknowledgement of service bearing the respondent's signature and other documentary evidence, to solicitor or court office for swearing.

Petitioner posts or takes the following documents to the court office:
   (1) completed request for directions for trial;
   (2) sworn affidavit of evidence; and
   (3) copy of respondent's signed acknowledgement of service and other documentary evidence exhibited to affidavit of evidence.

Registrar considers evidence and, if statisfied contents of petition sufficiently proved, issues certificate and fixes date for pronouncement of decree and, in children case, fixes appointment before Judge for children arrangements to be considered.

Court office sends to parties a notice of date for pronouncement of *Decree Nisi* and (in children case) date of appointment before Judge.

Court pronounces decree of date fixed (no attendance by petitioner or respondent is necessary).

In children case, petitioner attends appointment before Judge in private at Court regarding proposed arrangements for children (respondent may attend if he wishes). If satisfied, Judge declares proposed arrangements for children adequate.

Court sends parties copies of *Decree Nisi* and (in children case) order of Judge regarding children.

Six weeks later, petitioner obtains and completes form of application for *Decree Absolute* and posts it to court office.

Registrar considers application and, if satisfied makes *Decree Absolute*.

Court office sends certificate of *Decree Absolute* to petitioner and respondent.

THE MARRIAGE IS NOW FINALLY DISSOLVED: BOTH PARTIES ARE FREE TO REMARRY.'[10]

7.79 In Scotland the position is different. In an undefended case the judge reads the

file and if satisfied that the ground has been established, he publishes his decree for the dissolution of the marriage on the Rolls of the Court which are publically displayed for anyone interested to see. Solicitors for the parties are informed that a decree has been granted. There is only one decree. The judge will not pronounce it in a case where a child or children are involved until he is satisfied that proper provision has been made for the child or children. He does not have to be satisfied about financial matters before making his decree.

7.80 In his evidence to the Committee Sir John Nimmo, former Chairman of the Commonwealth Legal Aid Commission, reported that he had studied the situation in the UK and that it was working satisfactorily. He advised that:

- in spite of foreboding that the introduction of the procedure would increase the number of divorces there had in fact been a fall in the number of petitions filed;
- more than half the undefended petitions were being presented under the simplified procedure.

The Chairman of the Committee also paid a visit to the UK in the life of the committee. The success of the scheme in the UK had been facilitated by the activities of citizens' advice bureaux in assisting in the preparation of documents and a system operative in the UK known as the 'green form scheme' under which a solicitor received £25 for advice and assistance given to an eligible applicant. It is considered that the system could be even further improved by replacing legal jargon on the forms with ordinary language.

Recommendation 49

7.81 *The Committee recommends that the Government should take steps to foster organisations like citizens' advice bureaux in Australia.* The matter is discussed further in chapter 10 where we discuss court counselling and marriage guidance. Funding these bodies directly might lead to savings in legal aid funds payable to individuals. Some consideration might also be given to introducing a scheme similar to the 'green form scheme.' The Committee understands that in the UK, solicitors employ people to do the work involved in preparation and filing court documents.

7.82 The Committee is well aware of criticisms made of proposals to introduce such procedures in Australia. It is sometimes misleadingly referred to as 'divorce by post.' This view reflects the feelings that termination of a marriage is a serious step for all involved and that at the very least the parties should be present when the decree is pronounced. The truth of the matter is that the parties themselves do not have to be personally present but can be represented by counsel. The real issue is one of costs, both to the State and to the parties involved. It is not considered that much is gained by continuing to maintain a costly formality unless the procedure can be justified pragmatically. It is our view that the savings of expense to the parties warrant the introduction of simplified procedures in Australia.

Recommendation 50

7.83 *The Committee recommends that simplified procedures in the cases of undefended dissolution be introduced in Australia to provide for affidavit evidence without the necessity for parties to appear unless the court otherwise decrees.*

Regulations and Rules of Court

7.84 In contrast to the situation prevailing in other Commonwealth courts, practice

and procedure in the Family Court of Australia is prescribed by regulations made by the Governor-General in Council. These procedures also apply to any State Court exercising jurisdiction under the *Family Law Act* 1975; only Western Australia has established a separate family court exercising such jurisdiction. Proposed changes in the regulations are considered by a Joint Regulations Committee of the Family Court of Australia and the Family Law Council. This currently includes 2 judges of the Family Court, the principal registrar, the registrar of the Sydney Registry, a representative of the Commonwealth Attorney-General's Department and 3 representatives of the legal profession. The other judges and registrars of the Family Court of Australia have an opportunity to make proposals to the Regulations Committee. As with other Commonwealth courts the regulations are required to be tabled in both Houses of the Parliament and may be disallowed by either House.

7.85 In its Third Annual Report the Family Law Council observed:

> The present arrangement is cumbersome and leads to many delays. It is very difficult to obtain the many small amendments necessary to ensure the smooth operation of the Court. In many cases such amendments could be prepared without recourse to the parliamentary draftsman if different provisions applied (p.44, para 266).

7.86 In March 1979, the Senate Standing Committee on Constitutional and Legal Affairs published a Report on 'Parliamentary Scrutiny of Rules of Court.' After noting that it is the norm for rules of court to be made by judges of the court it was observed that there are good reasons for departing from that norm in particular instances. The Senate Committee identified three such reasons which were:

(1) to overcome difficulties caused through the exercise of federal jurisdiction by State courts or by State and federal courts. In the absence of specific statutory provision to the contrary, State courts when vested with federal jurisdiction by the Commonwealth Parliament continue to operate according to their own rules of practice and procedure. Accordingly, the rights of individuals under federal law may vary from State to State according to each court's rule of procedure. In order to overcome this situation the Commonwealth may therefore impose rules of court by Act or prescribe such rules by regulation in order to achieve uniform exercise of particular federal jurisdiction. The Commonwealth has already done this in respect of the Bankruptcy Rules made under the *Bankruptcy Act* 1966 and the regulations made under the *Family Law Act* 1975;

(2) to ensure practices and procedures of the court of a particular kind such as the requirement of s.97 of the Family Law Act as to formality of proceedings, ie. Parliament recognised the particular need for uniformity in Family Law proceedings;

(3) to remove from the responsibility of Judges the need to determine policy in relation to such matters as the fixing of fees.

7.87 In evidence to the Senate Committee the Chief Judge of the Family Court, Justice Elizabeth Evatt, indicated to the Committee that there are frequent and lengthy delays between formulating amendments to the Family Law Regulations and their actual amendment. Her Honour referred to the lack of direct involvement by the Family Court in the rule-making process and expressed the opinion that it would be desirable to establish a rule-making body comprising the judges of the Family Courts of Australia and of Western Australia and representatives of the practising profession.

7.88 The Senate Committee observed in relation to this evidence in para 3.11 of its report:

> By letter of 21 March, 1979 Justice Evatt advised that since notifying the Committee of her views she had also sought the views of the Joint Regulations Committee of the Family Court and the Law Council, the Family Court Judges' Law Reform Committee and the Family Law Council. Both the Joint Regulations Committee and the Judges' Law Reform Committee favoured the making of rules of the Family Court by the Judges of the Court rather than by regulation as at present. Justice Evatt summarised the general view of these two bodies as being 'that the actual rule-making authority should reside in a body of judges, but that the day-to-day task of considering proposals for change and consulting with the profession and other relevant organisations and individuals should be delegated to a sub-committee.' The Family Law Council has not yet communicated its views to the Attorney-General. No doubt the Joint Parliamentary Committee which is currently reviewing the Family Law Act will also wish to consider the matter. For our part we see merit in the view expressed by Justice Evatt, the Joint Regulations Committee and the Judges' Law Reform Committee that, consistently with the practice in other superior Commonwealth courts, the rules of court of the Family Court should not be made by regulation.

7.89 Accordingly, the Senate Committee concluded that the rules of court of superior Commonwealth courts should generally not be made by regulation. Making rules of court by regulation would only be warranted in the limited circumstances indentified; namely uniformity in the exercise of federal jurisdiction by State courts; achieving informality in Family Court proceedings and setting court fees for such policy (as distinct from management/administrative reasons) as the production of revenue and the discouragement of frivolous resort to court processes.

7.90 One of the recommendations made by the Committee was that rules of superior Commonwealth courts should, as a general rule, be made by a rules committee comprising the judges of the particular court and representatives of the legal profession regularly practising in the court. This recommendation was rejected by the Government (see Parliamentary Debates—Senate—15 November, 1979 pp. 2327-2332). In regard to rules of court the situation therefore remains that the rules are made by committees of judges of the court in question. In relation to the Family Court the situation still remains that its judges do not have rule-making powers possessed by the judges of other superior courts.

Recommendation 51

7.91 *The Committee supports the recommendations of the Family Law Council in relation to the body charged with the making of rules and regulations and accordingly recommends that:*

(a) *the rule-making power under the Family Law Act should reside in a body of judges of the Family Court of Australia and the Family Court of Western Australia with provision for the rules to apply to other courts exercising jurisdiction under the Act;*

(b) *matters such as costs and fees be excluded from the rule-making power;*

(c) *a committee responsible to the body of judges should continue to have the responsibility for receiving and considering proposals for the amendment of the regulations, for consulting with the legal profession and other interested groups and for making recommendations to the judges;*

(d) *the committee should have representation from the legal profession, the registrars of the court, the Attorney-General's Department and courts of summary jurisdiction and should consult widely before reaching its conclusion.*

7.92 In making this recommendation the Committee is conscious that its views are at variance with those of the Government when responding to the Senate Standing Committee on Constitutional and Legal Affairs.

Administration of the Family Court

7.93 The basis upon which the court has been organised is to establish registries of the court strategically in those States where the Family Court sits. Registries of the court have been established in:

Western Australia	Family Court of Western Australia—Perth
South Australia	Adelaide
Victoria	Melbourne
Tasmania	Launceston, Hobart
New South Wales	Sydney, Parramatta, Canberra
Queensland	Brisbane

In the Northern Territory, jurisdiction is exercised by the Supreme Court of the Northern Territory. The position in the two Territories is discussed in chapter 8. Branch registries of the court have been established in Townsville and Newcastle. Registry staff comprises registrars and legal staff, court counselling, court orderlies, list clerks, registry and records staff and personal secretaries of the judges.

7.94 The registrar is the administrative head of the organisation and this alone occupies a considerable amount of his time. The duties of the registrar and other legal personnel include the conduct of conferences, general advice to practitioners and litigants and the general management and administration of the registry. The Committee has been informed of different practices and procedures and styles of operation as between different registries of the Family Court. In its submission to the Inquiry the judges of the Family Court stated

> Between each of the Registries of the Court there are certain differences in practice and procedure concerning such matters as listing and pre-trial procedures. These differences are largely matters of form rather than substance, and have arisen in response to local needs. The Principal Registrar organises annual meetings of Judges, Registrars and Counsellors to discuss current problems and to achieve uniform solutions, where possible. The Family Court of Western Australia and the Supreme Court of the Northern Territory are invited to send representatives to these meetings. In addition to the three annual meetings, Judges' Committees meet from time to time on such matters as law reform counselling and regulations.

The Committee has however obtained the impression that these differences are more significant than is suggested by the judges in their submission.

7.95 The present arrangements is that apart from the Chief Judge there are some judges designated senior puisne judges. There is usually one senior judge in each registry who is in effect the judge in charge of the operation of the registry. The result has been rather different styles of operation and some quite significant differences in practice between registries. These differences relate to such matters as the way court counsellors are used. In the Melbourne registry for instance, we are advised that the counselling staff is much more heavily engaged in writing reports for judges than in some other registries. Some registries make a practice of referring parties to pre-trial conferences or to counselling. Differences exist in relation to the practice of affidavits between registries. It is acknowledged for instance, that in Melbourne there are many more contested custody disputes filed, the disposal of which on the whole takes longer. This appears from the table on page 134. One explanation for this is the significance of the Bar in litigated matters in the Melbourne Court. It is suggested that the profession in Melbourne is encouraged by the attitudes of the Family Court Bench

to brief counsel more frequently than is the case in other centres. A result of this is greater tolerance for and encouragement of an adversary approach in family law matters. In New South Wales and Queensland on the other hand, the Bench, within the limits of resources, attempts to encourage conciliation and discourage adversary proceedings.

7.96 It is not suggested that experimentation should be discouraged or that rigid uniformity is necessarily a good thing. But it is important that in important matters of policy there be a uniform approach. Uniformity of policy should flow from the Chief Judge and the Principal Registrar. The Committee has been informed that the Chief Judge of the Family Court and the Principal Registrar are not currently able to issue directions as to management and administration, binding on all registries and personnel of the court. This is different to the situation which applies in the Federal Court of Australia. There is a provision in the Federal Court Rules which says: 'subject to these rules and the direction of the court or a judge, the registrar of the court may give a direction as to the operation of any registry'. (Rules of the Federal Court 140.79 order 46 no. 7).

7.97 As has been pointed out the judges of the Family Court do not have the power to make rules. Nevertheless, the senior judges of the registries issue practice directions (see C.C.H. Reporter, 42,001) on a diverse range of subjects. In this connection the Review team that studied the Melbourne registry commented (para. 6.16-6.18) on confusion that had arisen at that registry as a result of conflicting practice directions. If such problems can come about in one registry of the court there appears clearly to be a need for overall co-ordination so that the Family Court adopts consistent policies throughout the several registries of the court.

Recommendation 52

7.98 *The Committee recommends that the regulations be amended to empower the Principal Registrar at the direction of the Chief Judge to issue directions binding on all registries and staff of the Family Court.*

Review of Legislation

7.99 Section 115 of the Family Law Act provides that the Attorney-General may establish a Family Law Council to consist of a Judge of the Family Court and such other judges, officers of the Australian Public Service or of the public service of a State, representatives of marriage counselling organisations and other persons as the Attorney-General thinks fit.

7.100 The Council is required to advise and make recommendations to the Attorney-General on the workings of the Act and other legislation relating to family law the working of legal aid in proceedings in family law and other relevant matters. The Council can initiate recommendations itself or can respond to requests from the Attorney-General in relation to matters specified. The Council is required to report annually to Parliament. The Council was first appointed on 5 January 1976 and has made three annual reports to Parliament. It has also conducted investigations into a number of areas and produced discussion papers as a basis for consultation with the public on a variety of matters. The output of the Family Law Council is impressive particularly if regard is had to the fact that the members themselves act in a voluntary capacity receiving only expenses by way of remuneration and that it has been provided with minimal staffing support. Such staff support has been provided by the Attorney-General's Department under that Department's staff ceiling guidelines. The

Council is also dependent entirely on the Attorney-General's Department to provide it with other facilities and resources.

7.101 It is clear that the Council has made a valuable contribution in the short period of its existence. Its activities enable the proceedings of the Family Law Act to be kept under review by a range of specialists and also for the community to make an input to various matters of concern arising from time to time under the Act. Its important role should be recognised to the extent that it is supplied with staff and resources adequate to its needs. If it is to continue to be serviced by the Department of the Attorney-General the staff ceilings of the Department should be adjusted to ensure that the Council's needs are adequately met. It is considered that the membership of the Council should be modified to include representation of the Parliament and of Magistrates. In view of recent legislative involvement with the Family Law Act there is now within the Parliament considerable expertise in relation to family law. As long as courts of summary jurisdiction continue to perform their important role under the legislation, magistrates should be represented.

Recommendation 53

7.102 *Accordingly the Committee recommends that the membership of the Family Law Council be extended to include representation of federal parliament. This representation should be drawn from the Senate and the House of Representatives. There should also be representation of magistrates on the Council.*

ENDNOTES

[1] Evidence p. 1753.
[2] Evidence p. 1847.
[3] Submission to Inquiry p. 1336-7.
[4] Evidence p. 6405.
[5] Evidence p. 6870.
[6] Evidence p. 1766.
[7] Submission to Inquiry p. 1340.
[8] Staff Utilisation Review, Melbourne Registry, Family Court of Australia, Report dated July 1979.
[9] CCH *Australian Family Law and Practice* p. 54,949.
[10] *Undefended Divorce*—General Guide to Divorce Procedures, Lord High Chancellor's Office.

Chapter 8

CONDUCT OF PROCEEDINGS BY STATE AND TERRITORY COURTS

8.0 State and Territory courts of summary jurisdiction, the State Family Court of Western Australia and the Supreme Court of the Northern Territory all exercise some element of the federal jurisdiction created by the Family Law Act. Courts of the States *continue to exercise jurisdiction in areas of family law such as adoption, succession,* and affiliation, not covered by Commonwealth legislation.

State Family Courts

8.1 The creation of State Family Courts has been an option open to State governments since the Family Law Act came into operation. This option was exercised by the State of Western Australia and the Family Court in that State has achieved a justifiable reputation for the high quality of the services it provides. In 1976 the Western Australian State Government passed the Family Court Act which restored to the State Family Court that jurisdiction which had been held in the *Russell* case to be outside the power of the Commonwealth to provide. The Family Court of Western Australia already exercises jurisdiction in relation to State type family law matters such as adoption, affiliation and domestic disputes between unmarried persons.

8.2 As already stated provision is made for the option of State Family Courts. We have already recommended that the Commonwealth might like to consider making a further offer to the States. We were informed by the Department of the Attorney General that active negotiations between the Commonwealth and the State of Queensland have been in progress since the inception of the Act. The Government of Queensland would like to establish a State Family Court but has been unable to reach agreement with the Commonwealth in relation to that matter. In the meantime the Government of that State has made it clear that it does not propose to refer powers to the Commonwealth. One of the factors hindering agreement between the Queensland and Commonwealth governments is the question of status and remuneration of judges. Until recently Queensland judges were paid considerably higher salaries than other state and federal judges of equivalent status. The latest recommendation of the Remuneration Tribunal, however, has restored parity between federal and Queensland judges. The federal Government is not in a position to countenance a situation where judges of the Family Court of Queensland would be in receipt of higher salaries than other judges of the Family Court and paid for by the Commonwealth. It is not clear at the time of writing whether the recommendation of the Remuneration Tribunal, if adopted, will affect the situation.

8.3 The Committee has already indicated that in its view the best way of ensuring that a Family Court in each State is in a position to exercise a complete jurisdiction in family law matters is for the States to refer the powers to the Commonwealth.

Territorial Courts

8.4 In the federal Territories of the A.C.T. and Northern Territory it is open to the

Commonwealth to establish Family Courts with a full jurisdiction in family law matters. This possibility is open because in these Territories, the Commonwealth has the legislative powers of both State and Commonwealth. Section 31(1)(c) of the Family Law Act provides that the Family Court has jurisdiction in matters arising under the laws of a Territory concerning the adoption of children, guardianship, custody or maintenance of children or affiliation payments. A working party under Mr Justice Ellis of the Family Court of the A.C.T. has been examining the question of an expanded jurisdiction in all areas of family law, including those matters like adoption and affiliation, currently governed by Territorial ordinances. It is understood that a report containing recommendations in this regard has recently gone to the Attorney-General. The Australian Law Reform Commission has, at the same time, been conducting an inquiry into child welfare laws in the A.C.T. It is understood that this report, too, will look at the role for the Family Court in the A.C.T. in relation to child welfare generally. It needs to be recognised, however, that the registry of the Family Court located in Canberra, serves a large area of New South Wales on a regional basis. Complications must inevitably arise in the exercise of the jurisdiction in the absence of a reference of power to the Commonwealth by the Government of New South Wales in relation to those matters held outside federal power in the *Russell* case.

Recommendation 54

8.5 *Despite the proximity of the A.C.T. to New South Wales and the difficulties that* a unilateral solution to the jurisdictional problems give rise to, *the Committee recommends that the Family Court of the A.C.T. should be invested with as broad a jurisdiction in family law matters under s.31(1)(c) of the Family Law Act as is possible.*

8.6 The situation in the Northern Territory is quite different. There is no Family Court registry in the Territory. Jurisdiction under the Act is exercised by the Supreme Court and by Territorial courts of summary jurisdiction. Under arrangements between the Supreme Court and the Family Court, regular circuit sittings of the Family Court occur in the Territory to deal with matters reserved for the court by the Supreme Court. The situation is complicated by the recent move to territorial self-government which has affected the status and position of the Supreme Court. One real possibility would be the creation of a Northern Territory Family Court exercising a full jurisdiction in family law matters. However, as the population of the Territory is too small to warrant the establishment of a registry of the Family Court of Australia it would be sometime before such a court would be created. Yet another proposal that has been floated is the possibility of creating a registry of the Family Court of Australia to serve the people of northern parts of Queensland and Western Australia as well as the Northern Territory. One problem with implementing such a proposal is that it would mean a great deal of travel and a heavy workload for judges appointed to the court. In relation to northern Western Australia there would be difficulties arising from the jurisdiction of the State Family Court under State legislation.

8.7 The Committee concludes that if the proposal in Chapter 7 for the establishment of branch registries were to be implemented, a more complete service would be provided to the citizens of the Northern Territory. A branch registry could be attached initially to the Supreme Court at Darwin to provide services to the Supreme Court judges exercising jurisdiction in family law matters and to visiting judges of the Family Court. A branch registry could also be provided at Alice Springs. It was noted by the Committee that counselling services were provided at a most inadequate level in the Territory. There is one counsellor located in Darwin, provided under arrangements

with the Director of Court Counselling, and one trained counsellor working with the Marriage Guidance Council.

Recommendation 55

8.8 *The Committee recommends that branch registries comprising a deputy registrar and court counsellor be established in Darwin and Alice Springs to provide services to the Courts in the Territory exercising jurisdiction under the Family Law Act.*

Courts of Summary Jurisdiction

8.9 Courts of summary jurisdiction of the State are vested with jurisdiction under the Family Law Act to deal with all family law applications other than applications for principal relief—that is to say, other than proceedings for a decree of dissolution of a marriage or a decree of nullity of a marriage or declarations as to the validity or invalidity of marriages or divorces made elsewhere. Proceedings can be taken in courts of summary jurisdiction with respect to maintenance of a spouse or children, custody, guardianship and access, approval of maintenance agreements in substitution for rights under the Act (s.87), the granting of injunctions and contempt of court as well as all enforcement proceedings. Property proceedings may also be commenced by either party but must relate to current pending or completed proceedings for principal relief.

Limitations on the Exercise of Jurisdiction by Magistrates

8.10 Under s.46(1) in proceedings in courts of summary jurisdiction with respect to:

- custody or guardianship of, or access to a child of a marriage; or
- property of the value exceeding $1,000,

and where proceedings are contested, the court must, unless the parties consent to the exercise of jurisdiction by the court, transfer proceedings to the Family Court or other superior court of record exercising jurisdiction. Under s.46(2) the court may of its own motion remove the matter to a court of superior jurisdiction irrespective of the wishes of the parties. Under s.10 the Family Court and courts exercising the jurisdiction shall not make an order in respect of custody, maintenance or guardianship of a child who is a State ward or who is under the care and control of a State Officer. But under s.10(3) the court may make such an order if it is satisfied that there are special circumstances that justify it in overriding the State law in question. This power does not extend to courts of summary jurisdiction.

8.11 The Family Law Act contains provisions, s.39(7) by which the use of courts of summary jurisdiction for whole States or Territories or for parts of a State or Territory can be phased out. The purpose of this provision is to facilitate consolidated jurisdiction in family law matters being eventually exercised in the areas in question by State Family Courts or by the Family Court of Australia. Under this power the jurisdiction of courts of summary jurisdiction must be phased out altogether or left intact. It is not possible to limit the aspects of jurisdiction that such courts can exercise.

8.12 It is instructive to contrast the provision of section 40(3) relating to the jurisdiction of the supreme courts which provides that the exercise of jurisdiction by these courts may be limited to proceedings of specified classes and may be expressed to apply only to the institution of proceedings in, or the transfer of proceedings to a particular registry or registries of a supreme court.

8.13 In its Working Paper No. 6 on the exercise of jurisdiction by magistrates, the Family Law Council observed that if jurisdiction of magistrates in particular matters were to be excluded section 37 would need to be amended to include a provision in similar terms to section 40(3) referred to above. It would also be a desirable amendment if it were felt that courts of summary jurisdiction should be limited in their operation to certain aspects of the federal jurisdiction as we discuss later in this chapter.

Recommendation 56

8.14 Statistical information available does not enable a precise determination of the use made of courts of summary jurisdiction or of the kind of jurisdiction mostly exercised to be made.[1] However it does appear that very extensive use continues to be made of these courts and that the nature of the jurisdiction so exercised varies considerably as between different States and Territories. There is a clear need for better information concerning and monitoring of the work of these courts under the Family Law Act. *It is recommended that steps be taken to obtain better statistical information concerning the work of the courts of summary jurisdiction under the Family Law Act.*

Submissions on the role of Courts of Summary Jurisdiction under the Family Law Act

8.15 In connection with courts of summary jurisdiction it was the original intention of the Senate Committee and the Government of the day that their jurisdiction would be gradually phased out in favour of the Family Court of Australia or State Family Courts. There have been strong submissions to the Inquiry that active steps should be taken to limit the jurisdiction of magistrates under that Act in certain respects. These submissions have been made by the Family Law Advisory Committee of the Law Council of Australia and members of the legal profession. The Family Law Council in each of its Annual Reports has been critical of various aspects of the exercise of jurisdiction by magistrates. The Council said in its First Report and has affirmed the view in subsequent reports, that 'the movement should be towards the Family Court dealing with all aspects of family law . . .'.[2]

8.16 Difficulties have been noted in relation to the approval of maintenance agreements under s.87, disposition of custody, particularly in regard to the making of *ex parte* orders and in relation to the exercise of injunctive power under s.114. Whilst a magistrate's court cannot, without the consent of the parties, determine questions of property where the amount involved is more than $1,000, it can approve agreements under s.87 by consent. Once an agreement is registered with the court, by consent, under this provision the matter can only be reopened in the circumstances envisaged by s.87(6), only if it is satisfied that the approval or concurrence of a party was obtained by fraud or undue influence or that the parties to the agreement desire the revocation of the approval. It appears that parties sometimes make such agreements which they later regret, thus, irrevocably affecting their rights under the Act. Similarly, in relation to custody, courts of summary jurisdiction may make orders which are not final but which may predetermine the future outcome of a suit. An order granting interim custody to one parent or the other is an example. In their Third Annual Report, the Family Law Council made the following points:

> In the Council's view there are strong and valid arguments for concentrating jurisdiction under the Family Law Act in the Family Court, so far as is practicable, subject only to the need to provide reasonable accessibility to the Court and to the availability of resources in the Court. The main obstacle at present to the transfer of all business to the Family Court is the lack of resources. It appears desirable at this stage that amendments be made to the Family Law Act which in due course, would enable jurisdiction to be taken away from courts of summary jurisdiction in particular regions or in respect of particular matters. Such a power could be exercised when the Family Court is able to meet the needs of the public in those regions or in respect of those matters.

8.17 *The Committee has also received submissions expressing the opposite point of* view. In a submission to the Committee and to the Family Law Council, Mr R. J. Bartley, SM, a Sydney magistrate experienced in the family law jurisdiction, *expressed the view that present jurisdiction should not only be retained but that it* should be extended to enable magistrates to grant divorces. He was re-assuring about the capacity of courts of summary jurisdiction to deal adequately with the jurisdiction currently exercised by them. This view was supported by Mr Sikk SM, of the Hobart magistracy. The Committee sought comments from the chief stipendiary magistrates in each State and Territory and while there was some support for the view that the jurisdiction of magistrates should be continued and extended, the magistrates made the following points:

- that courts of summary jurisdiction are very busy courts and additional work arising under the Family Law Act imposes strains on the work of the courts;
- the State courts of summary jurisdiction are expected to provide the same legal services under the Family Law Act as the Family Court provides but do not receive the support from registrars and counsellors;
- that proceedings in magistrates' courts are at variance with the philosophy of the Family Law Act in that they cannot be undertaken by specialists in the special court environment as envisaged by the Family Law Act;
- that there might be a role for magistrates in family law but as the Act now stands they are perceived as providing an emergency service.

8.18 Support for the proposal that a more extensive jurisdiction under the Act should be entrusted to magistrates came from the Victorian Council of Social Services and the Fitzroy Legal Service. It was submitted by them that in Victoria, courts of summary jurisdiction are underutilised and there is scope for diverting more work under the Family Law Act to these courts. Given the problems confronting the Family Court in Victoria where, as previously mentioned, the backlogs and delays are more severe than in other registries, this is presented as an attractive short-term solution to immediate problems. Courts and court facilities in Victoria are also available as a result of the construction of regional court buildings which provide the possibility of a specialist court environment.

8.19 It is essential however, in considering the submissions of those who advocate and extended jurisdiction for courts of summary jurisdiction, to recognise that the proposal is put forward as a means of overcoming present problems. For instance in evidence on behalf of V.C.O.S.S. it was submitted:

> We are particularly concerned about a number of defects in the Family Court as it operates for which we feel we have to look to magistrates to fill the gap. One is centralisation. This has become a particularly acute problem in view of the fact that such a large proportion of family law matters are now handled by A.L.A.O. referring them out to practitioners and not paying travelling time . . . This means that practitioners have to commute very large distances to request an adjournment on some matter which in a magistrates' court could be done by picking up the telephone. Either it is a cost which is borne by the privately paying client or if the client is in receipt of A.L.A.O. assistance it may result in that practitioner refusing thenceforth to take A.L.A.O. referrals, which therefore reduces the client's freedom of choice of practitioner. We see the increasing use of magistrates' courts or even the

existing use of an increased jurisdiction as being an important factor in making the law more accessible by making it more localised and therefore reducing costs . . .[3]

On the subject of jurisdiction, the views of the Victorian Council of Social Services are also worth noting:

> We would urge the Committee to give serious consideration to giving magistrates' courts full jurisdiction in contested custody matters. The main reason for this is delay. Family Court judges cost the taxpayer a lot of money. You need to virtually double or treble the number of judges for them to be able to handle all defended custody matters. In Victoria at the moment there is quite often underutilisation of magistrates . . .

8.20 The Committee sought the views of magistrates themselves on many of the matters raised by Mr Bartley and other witnesses who gave evidence to the Committee. On the question of jurisdiction there was a mixed response, the replies ranging from Mr Sikk[4] in Tasmania who saw no place for the Family Court at all, to those who expressed reservations on and total opposition to magistrates presiding over dissolutions. Some expressed doubt as to whether it would really relieve the Family Court of any workload and saw divorce by administrative process as a more acceptable alternative.

8.21 In Western Australia the jurisdiction of magistrates is in fact limited to outside the Perth metropolitan area, but there has been some acknowledgement of the value of magistrates' services by giving registrars magisterial status. By doing this, some of the more time consuming petty tasks such as dealing with consent orders, orders for the discovery of documents, minor transactions of maintenance and first return days for ancillary applications can be removed from the judges to registrars or magistrates. It is hoped that thereby judges might be freed to sit on more defended matters. The application of this practice in other States may not be possible as magisterial appointment is a State responsibility. It was suggested to Chief Justice Evatt when she appeared before the Committee in Sydney on 6 July 1979 that arrangements be made with the States to appoint magistrates to what would be a special Federal Court, as is already done for other areas of Federal jurisdiction[5] to which she replied:

> Yes, that is possible, and one that might be interesting in some of theses enforcement areas too.

8.22 It is recognised however, that it was desirable that the magistrates undertaking Family Law work should be specialists in the field. Attention was particularly drawn to the fact that the creation of additional judges so as to give the Family Court exclusive jurisdiction was an expensive solution to the immediate problem confronting the court. Nor would it be possible to appoint sufficient judges to provide an adequate service to rural and remote areas.

8.23 A number of considerations arise for discussion. In the first place there is the question of whether courts of summary jurisdiction are equipped and staffed to provide an adequate service under the Family Law Act. The evidence available to the Committee would seem to suggest that as presently staffed and operated they are not. Concern has been expressed by the Family Law Council[6] and the Law Council of Australia as to the quality of justice available from courts of summary jurisdiction. This view has been supported by other submissions from individual members of the legal profession.

8.24 In reaching conclusions on its study of the jurisdiction of magistrates the Family Law Council observed that:

> It is clear from the replies that magistrates do not always have the requisite time, knowledge and specialisation to deal with matters properly. It is also evident that unless the Family Court can provide the same degree of accessibility and speed of hearing, then the magistrates' jurisdiction with all its problems must be retained.

The latter statement goes to the very heart of the problem. The Chief Stipendiary Magistrate in the A.C.T., Mr C. F. Kilduff, SM, submitted:

> I was prepared to read the Act (Family Law Act) as being a direction to conduct family law matters in a special court environment with an emphasis on informality and relaxed procedures. In particular I was prepared to read the Act as a document which was prepared to accept as axiomatic that family law matters, where possible, should be removed from the environment of a court that deals at any stage of the procedural system with such cases as murder, rape, drug cases . . . I was further prepared to read the Act as making provision for magistrates' courts to deal with family law matters where a Family Court was not available in the immediate area or locality, and the provisions of s.39(7) of the Act were included to terminate the jurisdiction of the magistrate's court at the appropriate time when a Family Court was in a position to assume a total control in the particular affected area. I was again inclined to read the provisions of the Act as vesting concurrent jurisdiction in the magistrate's court as long as it was convenient to do so, but the concurrent provisions were not meant to extend in perpetuity. They were to last only as long as it was necessary to support the operation of the Family Court until that court was in a position, and had the resources to assume a total jurisdiction.

8.25 Those magistrates who made submissions were, however, confident that if required, they could adequately discharge these responsibilities provided they were given the necessary support. Mr Kilduff for instance, said:

> I have noted the submissions of Mr Bartley SM and would support any recommendation that would improve the operational efficiency of the Act. However, in respect of policy decisions as to the role of the magistrate in the Family Law area that must be exclusively a decision for the executive and legislature.
>
> I have no hesitation in declaring the fitness and qualifications of magistrates to deal with family law matters subject to the limitations I have set out above and subject to magistrates exercising their jurisdictional role in a family law environment with proper support and subject to proper arrangements.
>
> It must be remembered that the resources available to the magistrates' court in terms of the number of magistrates available is in excess of the family law judges that may be available at a particular time. For example this Territory has a chief magistrate, four stipendiary magistrates and three special magistrates but only two resident family law judges. In this regard I have in mind family law matters that require urgent resolution and for one reason or another a family law judge is not available.
>
> The question of maintaining purity of principle in the application of the provisions of the Act, (if it was the intendment of the Act to create a new court to deal exclusively with family law matters), must be balanced against the use and deployment of scarce resources to meet existing demands.
>
> I can see no objection, if it was decided as a matter of policy to employ magistrates in the family law court jurisdictional area and exercising that jurisdiction within the physical environment of that court, to make provision for magistrates to fulfil the role as lower court judicial officers subject, as mentioned above, to proper support and proper arrangements.

8.26 The magistrates themselves have pointed out that family law matters comprise only a component of the work of courts of summary jurisdiction. Much of their work is of a criminal and quasi criminal nature which means that the atmosphere of these courts is inappropriate for the disposal of family law matters. Certainly this will appear to be the case in comparison with the atmosphere and specialised services provided by the Family Court of Australia and the Family Court of W.A. It is pertinent, therefore, to ask who will be the clients of courts of summary jurisdiction and who will be the clients of the Family Court? It could possibly transpire that the population served by the courts of summary jurisdiction would comprise that element of society already

socially and economically disadvantaged. It would be unfortunate, in the Committee's view, to do anything that could result in those with sufficient resources being able to purchase the superior services available from the Family Court while the courts of summary jurisdiction were left to dispose of the residue of cases without attempts being made to ensure that the same support and facilities were available in all courts which must of necessity deal with family law matters.

8.27 Certainly, such a result could be avoided if steps were taken to improve the support services available to magistrates. At the present time counselling services are available to courts of summary jurisdiction on a more restricted basis than to the family courts. Courts of summary jurisdiction are not structured or equipped at this time to conduct pre-trial procedures under regulations 96 and 99. Magistrates have complained that they are not receiving support in the way of the provisions of legal resources, such as the reporting services supplied by Butterworths and C.C.H. Clearly every effort should be made to ensure that courts of summary jurisdiction are supported so that they are able adequately, to provide the legal services under the Act. This might do much to improve the quality of services currently being provided to overcome some of the criticisms that have been made of magistrates by the Family Law Council and the legal profession concerning the professional standard of the work of these courts.

8.28 Some recent developments suggest a trend which might be capitalised upon if it was sought to develop a jurisdiction for magistrates in Family Law. For instance the court of summary jurisdiction in Prahran, Victoria, has tended to specialise in domestic relation matters. It was submitted to the Committee on behalf of the magistrates of this court:

> The Magistrates at the Prahran Complex are very conscious of the Conciliation provisions under s.14 of the Act, and conferences are frequently held in Chambers with Counsel and often the parties with a view to effecting a reconciliation pursuant to s.14(2) (a) and (b).
>
> The principles of section 43 are applied and the adversary type of hearing is used only as a last resort. To this end compulsory conferences with the Registrar under Reg. 96 and Reg. 99 are often used to define areas of dispute and so shorten court hearings and/or effect a *settlement between parties*. Reg. 99 conferences are usually conducted with Counsel but without the parties so as to avoid further aggravation and polarisation of the parties. Where conferences are not called the parties and their representatives are given every encouragement to talk and settle the areas of dispute between them.
>
> There is a noticeable trend to have difficult custody and access cases heard at Prahran without transfer to the Family Court, if the Barristers and their parties are aware that the Magistrate is conversant with the latest law in custody and access and willing to give the parties a conscientious and patient hearing. To that end, Prahran has the advantage of being staffed with four Magistrates every day, and any case likely to take two hours or more may be booked in so that the parties are sure of a Court hearing on the return date.

8.29 Another factor that needs to be considered is that the training and qualifications of magistrates varies from jurisdiction to jurisdiction. Thus, in Tasmania and Western Australia, special magistrates must have the same qualifications for appointments to the bench as are required for judicial appointments. In other States however, appointments to the magistracy are made on the basis of internal promotion in a special magistrates' service. The result is an uneveness of quality around Australia of the persons who are called upon to exercise jurisdiction under the Act. This contrasts sharply with the stated ideal for appointment to the Family Court Bench.

8.30 There would appear to be three policy alternatives open:

(a) The original intention of the legislation that the jurisdiction of magistrates should be gradually phased out should be adhered to. This would result in a situation like that

in Western Australia where the jurisdiction has been reduced to the extent the Family Court can cope. In connection with this approval the appointment of some registrars as magistrates to deal with maintenance and minor matters of enforcement might be considered. The problem here is, however, that magistrates can be appointed under State law but not Commonwealth law with the result that the appointments would require to be State appointments.

(b) To revise the whole approach to Family Law by recognising a continuing jurisdiction for existing courts of summary jurisdiction. If this were to be the preferred role then it would be essential for the following recommendation of the Family Law Council to be implemented: 'That library facilities, training sessions and seminars in family law be provided for magistrates exercising jurisdiction.' The legislation would need to be reviewed with the purpose in mind of distinguishing the jurisdiction to be exercised by the judges of the Family Court and State courts of summary jurisdiction respectively. This could be achieved by an amendment to the Act to enable jurisdiction to be conferred on designated courts of summary jurisdiction and in relation to specified classes of proceedings. (see para. s.8.11 and 8.12).

(c) The creation of a special lower tier of jurisdiction to be exercised by State appointed magistrates who would deal with a wide range of matters under the Family Law Act and under the legislation of the State in question to provide a comprehensive family law jurisdiction. It may well be that there is justification for creating a lower tier of jurisdiction in the Family Court system which might be exercised by judicial personnel with a status lower than that of justices. If this is to be the case, however, definite decisions need to be made concerning elements of the jurisdiction to be entrusted to this lower tier. The work of these magistrates also needs to be related to the pre-trial work of registrars so that it fits into the Family Court system as a whole. If the lower tier judicial officials are State appointees and the courts from which they operate are State courts there will be difficulty in co-ordinating the family law system. It is not surprising, therefore, that the Family Law Council and the profession tend to favour solely federal solutions to the problem.

8.31 It is considered desirable that courts exercising jurisdiction under the Family Law Act should have the attributes envisaged for the Family Court itself, namely, that:

- the jurisdiction should be invested in judicial officers selected for their special expertise and personal attributes;
- that the court should be supported by the specialist counsellors trained in the behavioural sciences and skilled in the areas of social welfare work and the dynamics of interpersonal relationships;
- that proceedings in the court should be conducted in an atmosphere conducive to the conciliation and adjudication of domestic disputes;
- that there should be emphasis on helping the parties to reach agreement and helping them to avoid adversary court proceedings wherever possible.

8.32 Although some State courts of summary jurisdiction possess some of these attributes the evidence clearly indicates that this is by no means the situation generally. Under the Act as it is at the moment, there is a blanket investiture of State courts of summary jurisdiction under the Act, which subject to the limitations referred to earlier, is exercised concurrently with the Family Court. The categories of courts as courts of summary jurisdiction embrace a variety of tribunals with both specialist and generalist jurisdiction. In talking about courts of summary jurisdiction one may mean single magistrates in a remote region whose court may be the only court readily available to those living in the area or one may be talking about courts within the metropolitan areas of cities which might have quite specialised functions, such as children's courts

or licencing courts. It is essential, in the Committee's view that the Family Law Act should be amended to make it possible for courts charged with the exercise of jurisdiction under the Act to be specifically designated so that only the most suitable courts can exercise the jurisdiction.

8.33 One of the problems noted in the evidence discussed in this chapter is the discrepancy between the specialist tribunal in the form of the Family Court and courts of summary jurisdiction which may or may not have some or all of these special attributes. The Committee considers it essential that parties who by reason of their residence in remote locations or who, for other reasons must have their matters dealt with in a court of summary jurisdiction, should not be disadvantaged in regard to the quality of service they might expect to obtain from the court. Some of these discrepancies could be overcome by providing the magistrates' courts with professional materials and providing access to counselling and other services. It is considered that this is an urgent matter and should be dealt with immediately.

Recommendation 57

8.34 *The Committee recommends that every effort should be made to ensure that all courts of summary jurisdiction exercising jurisdiction under the Family Law Act or likely to exercise such jurisdiction, should be supported by the provision of services to enable them to provide the legal services under the Act that they are expected to provide. Conciliation services such as counselling and pre-trial procedures should be available from these courts. In this connection our recommendation no. 46 in chapter that branch registries staffed by counsellors and deputy registrars of the Family Court in remote regions should be noted. The services of these officers should be available to local courts of summary jurisdiction as well as to the Family Court on circuit.*

8.35 Although this is considered an imperative first step, it does not, in the Committee's view go far enough. If the concept of those who conceived the Family Court is to be achieved then all proceedings should be dealt with by specialist tribunals with the special attributes noted earlier. Equally, as we have already noted the opportunity should not be lost to constitute tribunals which can exercise an ample jurisdiction in the area of family law generally wherever this is possible. This ample jurisdiction refers to those matters that either fall within the responsibility of States or have been held to be outside the scope of Commonwealth power. Unless State Governments are prepared to confer State commissions on federal judges and vice versa or to create State Family Courts like that in Western Australia it is difficult to see how this aim can be achieved given the constraints inherent in the federal structure of government. Experience so far would suggest that the prospect of the Commonwealth reaching agreement with all the States to achieve this aim is not very good. It is considered that a further option is available. This is for the States to create special courts of summary jurisdiction with the attributes of a Family Court. Such special courts would exercise the jurisdiction in specified classes of proceedings under the Family Law Act and would also deal with a wide range of family law matters under State law. It is considered that such courts could in addition to matters arising under the Family Law Act also deal with such matters as juvenile offenders, adoption and affiliation and the domestic disputes of those in *de facto* relationships.

8.36 In putting forward the proposal the Committee wishes to make the point that family law problems are likely to surface elsewhere than in the divorce court alone. Proceedings in court involving juvenile offenders may often for instance indicate a family in trouble. It should be possible for the services of counsellors to become available in such situations. This may lead to later proceedings in the Family Court being averted. It is not sufficient in the Committee's view for the therapeutic services provided by the Government to be simply placed in a federal box marked divorce. If the aim of preventing marital problems and averting family breakdown is to be achieved then services should be available and able to operate on a wide front. In certain provinces of Canada this has been observed and services mounted accordingly so that they are available over a range of crises situations affecting families which may not involve, but which may be a prelude to divorce. The Chairman of the Committee was able to observe such a system in operation in the city of Edmonton in the Canadian province of Alberta.

8.37 It is clear that it would not be open to the Commonwealth alone to implement such a system nor in our view would it be appropriate. There are constraints on the power of the Commonwealth to legislate for the activities of State courts exercising federal jurisdiction. One approach considered by the Committee involves the provisions of s.39(2) of the Judiciary Act which invests State courts with federal jurisdiction. Section 39(2) (d) provides that:

> The federal jurisdiction of a Court of summary jurisdiction of a State shall not be judicially exercised except by a Stipendiary Magistrate or Police or Special Magistrate or some Magistrate of the State who is specially authorised by the Governor-General to exercise such jurisdiction.

8.38 It appears to be an open question whether the Commonwealth could invoke this provision to specify particular magistrates or magistrates with particular attributes to exercise the jurisdiction in mind. The difficulties which involve complex points of Constitutional law are discussed in a note prepared by our consultant, Mr Gee, which is appended as appendix 6.

Recommendation 58

8.39 However, were it considered possible the Committee would *recommend that the Family Law Act be amended to provide that the federal jurisdiction of courts of summary jurisdiction be exercised, in each State by magistrates (specifically named) specially authorised by the Governor-General to exercise such jurisdiction. It is envisaged that the Governor-General would only authorise the exercise of jurisdiction by magistrates considered by his advisers to be appropriately qualified to exercise the jurisdiction. The Act should be amended to empower the Governor-General by Proclamation to confer jurisdiction on identified State courts and in respect of identified elements of the jurisdiction in family law matters.*

8.40 These courts would have available to them the services of court counsellors. Given the existence of substantial resources available to the States in the welfare area it is not considered that the counselling service should be provided by the Commonwealth although some court counsellors from the Family Court would be assigned to these courts on an exchange basis. The bulk of workers would be provided by the State governments. The States would be assisted to establish these courts by the Commonwealth which would provide funding on a continuing basis as outlined in chapter 10.

ENDNOTES

[1] In its recent Discussion Paper (No. 6) the Family Law Council provided the following statistical information. In New South Wales, in 1978 a total of 12,928 matters, under the Family Law Act, were listed for hearing by courts of petty sessions throughout the State. These matters comprised 3,022 enforcement proceedings and 9,907 other matters. The clerks of petty sesions, however, have informed the Family Law Council that the figure would have been double this, had applications filed but not listed for hearing because they were withdrawn, been included. Figures for applications filed in the A.C.T. comprised 135 enforcement applications and 461 other matters; a total of 596. Figures for Victoria

related only to maintenance enforcement. In 1978, 4,536 maintenance orders were made or varied; 1,182 orders were struck out or dismissed and 1,698 applications in relation to arrears of maintenance were made. The figures included orders made in relation to ex-nuptial children under State legislation. In the court of petty sessions, Hobart, 110 orders were made, 162 adjourned, 48 dismissed and 20 withdrawn in 1978. Figures for country areas of Western Australia reveal that 89 applications were made (48 orders); 68 applications for custody and access (48 orders), 13 applications for injunctions were filed (6 orders) in 1978. In Queensland, figures are available for rural areas only. In 1978, 3,590 applications were filed. No statistics are available for South Australia.

[1] First Annual Report of the Family Law Council—Para. 13.

[2] Evidence to Inquiry pp. 2266-7.

[3] Evidence to Inquiry p. 3816.

[4] Evidence to Inquiry p. 5544.

[5] The Family Law Council in its First Annual Report observed in Relation to Custody:

(a) Custody is one of the most difficult aspects of the work of the Family Court. It was in recognition of this that special provisions were put into the Act dealing with the selection of judges and with the creation of a court counselling service to handle conferences and provide reports in custody cases.

(b) Magistrates as a group need have no special training or experience to deal with custody matters. Though some may possess the right outlook and experience there is no guarantee of this.

(c) If one party wishes a custody case to be determined by the Family Court the other party ought not to be entitled to prevent this by the mere fact of having filed the application first.

(d) Magistrates' courts have no counsellors to assist parties to settle their differences and to develop a satisfactory arrangement which will preserve their relationship with the children. The atmosphere of some magistrates' courts is far from suitable for family matters.

(e) The interests of children require that custody cases be dealt with by the forum which has been especially planned and equipped for that purpose.

(f) The right of appeal is not a satisfactory safeguard to a party who wants the Family Court to determine the matter. Not only is there likely to be further delay, but the extent of the appeal is limited in some respects.

In its Second Annual Report the Council had occasion to note in relation to *ex parte* orders (see paras 123-126):

The Attorney-General's Department referred to the Council a number of complaints about the alleged undesirable consequences of *ex parte* orders made under the Family Law Act. Under regulation 42 the court may make an *ex parte* order:

- concerning the welfare or custody of, or access to a child of a marriage;
- in respect of urgent maintenance cases under s.77;
- where this is necessary to prevent transactions to defeat claims under the Act (s.85);
- where an injunction is ordered under s.114.

The complaints related mainly to injunctions and to orders in respect of children. It was suggested that courts of summary jurisdiction grant *ex parte* orders too often where this is not necessary.

Parties have been ordered to leave the matrimonial home and children have been removed from the custody of a parent in each case without notice. The results of precipitate action can be distressing. There are a few cases where the court must make an immediate order without notice to the respondent, in order to protect the person or property of the applicant or the interests of a child. In most cases however, the situation can be met by fixing an early return date even within 24 hours.

Even where it is necessary to make an *ex parte* order, the complaint is made that the court does not always fix an early return day for the further hearing of the matter after service. Under regulation 42(5) an *ex parte* order shall be expressed to operate only until a specified time or the further order of the court.

The Council has referred to the Regulations Committee the question whether any changes are necessary to further restrict the power of the court (and in particular courts of summary jurisdiction) to grant injunctions e.g. by making the order returnable within a minimum period.

Property

The Family Law Council, the Law Council and concerned members of the legal profession have been critical of the implications of the exercise by magistrates of the power to approve agreements in substitution of rights under s.87 of the Act. In the Third Annual Report, the Council reiterated its view that this power should be withdrawn from magistrates because of the consequences to one of the parties.

The two areas of greatest concern are the power under s 87 to approve maintenance agreements in substitution for rights under the Act and the power under s 114 to grant injunctions. The amendments to ss.87 and 96 made by the *Family Law Amendment Act* 1979 have alleviated to some extent the problems that have arisen as a result of the exercise of jurisdiction under s.87 by magistrates. The complete removal from courts of summary jurisdiction of power in s.87 matters appears to be a necessary further step, in view of the issues involved. The Council has already recommended to the Attorney-General that this be done. (First Annual Report, p. 19, para 105).

Chapter 9

OPEN AND CLOSED COURTS

9.0 Section 97 of the Family Law Act provides that proceedings in the Family Court, or in another court excercising jurisdiction under the Act, shall be heard in closed court. Early in the life of the Act the High Court ruled that this provision, so far as it referred to State courts invested with federal jurisdiction under the Act, was beyond the constitutional powers of the Commonwealth.[1] Accordingly, the provision does not apply to State courts of summary jurisdiction or to the Family Court of Western Australia which has always sat in open court. The Family Court of Australia, however, sits in closed court except that relatives and friends of either party and certain professional workers such as marriage counsellors, welfare officers and legal practitioners may be present in the court unless specifically excluded. Pursuant to regulation 105, the court may where parties consent or the court considers that it is desirable in the public interest to do so, direct that a person may be present in court. Pursuant to this regulation, members of the Committee were permitted to be present and observe the proceedings of the Family Court in a number of its registries in the course of the Inquiry. Regulation 105 also provides that any person may be present where the proceedings relate to the imposition of penalties under the Act that is to say in relation to contempt proceedings under ss.114(4), 108 and 70(6) of the Family Law Act.

9.1 These provisions need to be read in conjunction with s.121 which deals with publication of evidence. This section precludes the publication of information about or evidence given in proceedings under the Family Law Act. There are exceptions to permit the publication of official reports of proceedings and, at the discretion of the court, to allow publication of material by professional observers of the work of the court. Section 121 governs proceedings under the Family Law Act in all courts including State courts and its existence has in fact been perceived by some as a reason for making the courts themselves more open to the public. In *Russell* v. *Russell*[2] Mr Justice Gibbs stated the principles considered to apply in relation to access to the courts and the publication of proceedings:

> It is the ordinary rule of the Supreme Court, as of the other courts of the nation, that their proceedings shall be conducted 'publicly and in open view'. (*Scott* v. *Scott* (1913) A.C 417 at p. 441). This rule has the virtue that the proceedings of every court are fully exposed to public and professional scrutiny and criticism without which abuses may flourish undetected. Further, the public administration of justice tends to maintain confidence in the integrity and independence of the courts. The fact that courts of law are held openly and not in secret is an essential aspect of their character. It distinguishes their activities from those of administrative officials, for 'publicity is the authentic hall-mark of judicial as distinct from administrative procedure'. (*McPherson* v. *McPherson* (1936) A.C P177 at p. 200). To require a court invariably to sit in closed court is to alter the nature of the court. Of course there are established exceptions to the general rule that judicial proceedings shall be conducted in public; and the category of such exceptions is not closed to the Parliament. The need to maintain secrecy or confidentiality or the interests of privacy or delicacy may in some cases be thought to render it desirable for a matter, or part of it, to be held in closed court.[3]

9.2 The effect of ss.97 and 121 of the Family Law Act is thus to reverse the usual

presumption that proceedings should be open and reportable unless the court determines otherwise. It appears from the debates when the Family Law Bill was being considered by Parliament that two particular factors influenced the decision to make the Family Court a closed court and to restrict publication of its proceedings. The first was the view that no special public interest was served by exposing the private domestic disputes of individuals to the public gaze and the glare of publicity in the media. The second was the recognition, well attested, that certain sections of the press had for years exploited divorce court proceedings.

Submissions to the Inquiry disclose a range of views on the subject of closed and open courts and publication of proceedings.[4] As slightly different issues are raised by the questions of closed courts and of restrictions on the publication of the proceedings, it is convenient to treat them separately.

Public Access to the Proceedings of the Family Court

9.3 It was submitted by the Judges of the Family Court that:

> The views of the Judges on the issue of open or closed courts are divided. The majority is clearly of the view that the balance is in favour of opening the Court in accordance with the principle that justice should be seen to be done, and that the public should have the opportunity of seeing the Courts exercising their important social function. Closed courts encourage criticism of the Court by those who are unable to scrutinise it in action. It also encourages disappointed litigants to make unjustified criticisms of the Court. Where the Court is open, as in Perth, few people avail themselves of the opportunity to come. The Courtrooms are small in size which would, in any event, limit the number who could enter. In case of upset or embarrassment, the Court could order persons to leave the Court.
>
> Some Judges hold strongly to a contrary view, namely that the Court should remain closed because the matters with which it deals are essentially private matters between the parties and of no concern to other people. It is thought that parties should be spared the embarrassment of discussing their affairs in front of strangers. The provisions of the Act which call on the Court to act without undue formality are designed to help people feel at ease in a situation where their personal and emotional lives are under close scrutiny. Opening the Court to the public (or even worse, to inquisitive neighbours) would inhibit parties in giving evidence about their personal affairs.[5]

9.4 The Family Law Advisory Committee of the Law Council of Australia informed the Committee that the legal profession seemed evenly divided on the issue. The Family Law Council has consistently supported the proposition that the court should be more open. In its First Annual Report[6] the Council reported that it had recommended to the Attorney-General that, except in cases concerning children proceedings should be conducted in open court, the court having a discretion to exclude the public. Where the court was exercising jurisdiction with respect to custody, guardianship or access to children, however, the Council considered that the existing provisions should apply. Recently, the Council reviewed its original recommendation. The Council recommendation now is that s.97(1) be repealed with the intent that the Family Court and other courts exercising jurisdiction be open subject to a discretion in the court to close the court. The court would exercise the discretion either on its own motion or on the application of a party to the proceedings.[7]

9.5 The following points were made in submissions:

- people who are going to appear before the court should be able to attend and watch proceedings;[8]
- attendance of the merely curious should be discouraged;[9]

- students who work with people who have family problems need to be able to observe the court in action;[10]
- sufficient privacy should be maintained so that petitioners and witnesses do not feel they are on display;[11]
- proper administration of justice requires that the court be conducted openly so that the public can inform itself as to the way in which the court reaches its decisions;[12]
- the court should be given a discretion to close the court where this is in the best interests of the parties and children of the parties;[13]
- alternatively, there should be a discretion to close the court upon application by one of the parties to the proceedings;[14]
- all contempt proceedings should be held in open court.[15]

9.6 It is concluded by the majority of members of the Committee that the decision to close the Family Court to the public went further than was necessary to protect the privacy of parties to proceedings in the court. On the basis of private letters and submissions received, it is our impression that the requirement is resented by many people who have been involved in proceedings in the court. This has an unfortunate psychological impact on some litigants who complain that they have been denied justice and denied as well, the right to have their grievances against the system made public. It has meant that charges and allegations concerning the proceedings or concerning the conduct of judges, counsel and officers of the court can be made which can be neither confirmed nor rebutted. It has inhibited disinterested observers of the proceedings who wish to observe and comment on the conduct of proceedings. It has meant that permission to be present in court needs to be actively sought by people wishing to undertake legitimate research on the court and its work. This has added, unnecessarily, to the work of court officers. Most important of all it has meant that the administration of justice in the Family Court is in a different category to the administration of justice in other courts in that its proceedings are not open to critical lay and professional observation and comment.

9.7 It has been apparent to the majority of the Committee that the administration of justice in the Family Court is open to criticism by slur and innuendo in circumstances which do not allow for either investigation of charges or rebuttal of the allegations. Judges of the Family Court are empowered to make orders with far reaching effect on the lives of parties to proceedings in the court. Officers charged with the duty of exercising such comprehensive powers must enjoy the confidence of the public if they are to discharge their necessary social function. It is concluded that one way that such confidence can be fostered is to make the court more open. This is not to say, however, that the court should be open in every case. Certain exceptions to the rule that justice should be administered openly have always been recognised. A discretion to close the court where the court would not be able to administer justice in the case in question or where the purposes of the litigants would be defeated, as for instance where trade secrets are involved, has long been recognised. It is an open question whether courts can be closed in the interests of public decency or to protect the reputations of individuals. However, the legislature has created a number of situations where it is recognised that proceedings should be closed. These cover cases that concern children or involve the secrets of the State or the interests of public decency. The reversal by s.97 of the presumption that justice should be done in open court is an example of the intervention of the legislature. It is concluded that the Family Court should have a wider power than exists at common law to close the courts and that this should involve the exercise of a judicial discretion to protect the privacy of individuals

involved. It should be open to the court to exercise this discretion either on its own motion or upon application by a party to the proceedings or an intervenor.

Recommendation 59

9.8 Accordingly, the Committee *recommends that the Family Court be open to the public provided that the judge retains a discretion to exclude persons from the court of its own motion or on the application of a party. In the case of closed proceedings, the court should have a discretion to permit persons to enter.*

Publication of Proceedings

9.9 Section 121 applies stricter rules against publication than were contained in s.123(1) of the repealed *Matrimonial Causes Act* 1959. Under those provisions, names of parties, a statement of the issues, the submissions on law and the judgment of the court could be published unless the court ordered otherwise. No other account of or evidence in the proceedings could be published. Under s.121 a person shall not print or publish any statement or report that proceedings have been instituted or any account of evidence in proceedings. Heavy penalties are prescribed for infringement. Exceptions to the ban on publication are:

- printing of transcripts and court documents such as notices or law lists;
- *bona fide* publication intended for professional use such as law reports.

9.10 The provisions of s.121 of the Family Law Act are sometimes relaxed at the discretion of the court where, for example, the assistance of the public is needed in tracing a child or where there has been a serious contempt of court. In the latter case the court will often direct that a party's name should not be published.

9.11 A consideration of the evidence available to the Inquiry indicates a wide range of views on the extent to which publication of the proceedings of the court should be permitted. In his evidence to the Inquiry the Attorney-General for Western Australia, the Hon. I. G. Medcalf, MLC stated:

> The State Government holds the view that the Family Law Act should be amended to enable proceedings to be open and permit coverage by the media.
>
> The Commonwealth Parliament should amend the Family Law Act to allow reporting as a general rule, rather than as an exception. The courts should be under public scrutiny and, if the press were permitted to cover Family Court proceedings, this would happen.
>
> There are only a few special circumstances where reporting should not be allowed, such as where a person's identity is of no legitimate public interest or when an individual's privacy needs to be preserved. The Family Court, in other words should be subject to the same rules as other courts; namely, to be open to the press but with the right of the court to sit in camera or to restrict publication on appropriate occasions. However, it needs to be emphasised that there should not be a return to the days when a small section of the press indulged in muckraking coverage of divorce cases. This happened with sections of the press in the past. Since then there has been an improvement in standards of public taste, and it is felt that if the court is open to the media as well as the public there should be no irresponsible prying into other people's affairs. Indeed, the quest for truth in the court itself is likely to be enhanced.
>
> The news media should be able to report matters of genuine public interest. This is especially so when it is remembered that the Family Court is a new institution, offering a new approach to the resolution of matrimonial problems.[16]

9.12 Other submissions to the Committee suggest that there is a lack of knowledge generally about the court and its procedures and about the kind of decisions it makes. It has been submitted that in order to dispel any mystery that surrounds the court and

in order to give people an understanding of the kind of decisions made, the press should be able to publish actual decisions of the court. Yet again other submissions have argued that the relaxation of the present rule should be subject to careful control to ensure that an individual's right to privacy is adequately protected. Suggestions for the exercise of such control include proposals that:

- publication of reports and proceedings before the Family Court be permitted and the press be free to report proceedings in the Family Court provided that no names or identifying features of the parties are included in such reports;
- names and addresses with concise statements as to the nature and grounds of the proceedings points of law and the decision of the court on these points be published as was the case under s.123 of the Matrimonial Causes Act;
- the presiding judge should be authorised to give directions as to what material could be published and again judges should, in exceptional cases, be authorised to prohibit publication absolutely.

9.13 Proposals to reopen the court to coverage by the media have been opposed in a number of other submissions. It is the view of those who believe that publication of proceedings should continue to be restricted, that any relaxation of the present provision would almost certainly result in exploitation of the private affairs of individuals by certain sections of the media. Those who hold this view can point to the activities of certain publications in their reporting of court proceedings. They believe that it would be almost impossible to devise controls that would effectively prevent these activities.

9.14 The question of the extent to which the publication of the details of matrimonial proceedings should be restricted has received recent attention in the United Kingdom and Canada. In the UK the general public but not the press, is excluded from matrimonial hearings. The press is restricted in what it may publish to names, addresses and occupations of the parties and witnesses; the grounds of the application; a concise statement of the charges, defences and counter-charges; submissions of law; the decisions of the court; and any observations made by the court in giving its decision.

9.15 In its Report *A Better Way Out*, the Family Law Sub-Committee of the Law Society of Britain stated that 'it is fundamental principle of justice that the press should not be excluded from the courts and there is no court in (England) from which they are excluded'. The Committee continued: 'The right of the press to be present in court is too important a feature of democracy and justice to abandon'. On this issue the Family Law Sub-Committee concluded:

> In our view, the best solution would be to allow the press access but impose reporting restrictions broadly on the lines of s.39 of the *Children and Young Persons Act* 1933 the purpose of which is to prevent information being reported by which any child involved in any way in juvenile court proceedings can be identified publicly. As long as reporting of matrimonial proceedings by the press or other media is sufficiently restricted to ensure that the parties and anyone else involved such as children cannot be identified we feel that their privacy is adequately protected.'

9.16 The majority of members of this Committee believe that the rules restricting publication of proceedings in the Family Court should be relaxed. It is believed that this is necessary if the public are to be properly informed concerning the operation of a court in a free society and the conduct of the Family Court should be open to scrutiny and media comment as much as any other court. The existing provisions are too restrictive and inhibit proper public debate concerning the work and performance of the court. There is a need, however, to protect parties who may be vulnerable to

irresponsible exploitation of their private affairs by certain sections of the media. To this end the court should be given wide power to impose restrictions on the extent to which the media may report certain cases. The legislation should specifically restrict the reporting of names of parties or any information that might lead to identification of the parties. The media would obviously be excluded and prohibited from reporting those proceedings conducted in camera by the court pursuant to its powers to close the court proposed in Recommendation 59.

9.17 As long as reporting of matrimonial proceedings by the press or other media is sufficiently restricted in this manner, the Committee considers that the privacy of the parties and those closely involved in the proceedings is adequately protected.

Recommendation 60

9.18 The Committee therefore *recommends that the publication of the details of proceedings under the Act should be permitted and that steps should be taken to relax the restrictions on publication contained in s.121 of the Family Law Act, provided that the names of the parties and any other identifying information is prohibited from disclosure. Severe penalties should be provided for infringement.*

9.19 Attention is drawn to the use of names in reporting family law cases. The matter is referred to in the submission of the judges of the Family Court of Australia:

> The Family Law Council has under consideration the present practice, under which the names of parties may be used in law reports published for the use of the profession by official and commercial law publishers. Such publication is permitted by s.121(5) (d) which covers:
>
> > the printing or publishing of any publication *bona fide* intended primarily for the use of members of the legal and medical professions, being—
> > (i) a separate volume of part of a series of law reports; or
> > (ii) any other publication of a technical character.
>
> It is considered by some that the use of names in such reports is an invasion of privacy which cannot be justified on the ground of convenience of the profession. There are precedents for identifying cases in law reports by initials, by numbers or by use of christian names only. Such a change in practice might cause some inconvenience to the profession in view of the large number of reported cases.

9.20 It is concluded that family names should continue to be used in reporting Family Law cases as no invasion of privacy is really incurred by their use in reports intended solely for the use of the legal profession. The use of such names facilitates consideration and identification of specific cases and still allows a discretion to be applied where considered necessary.

ENDNOTES

[1] *Russell* v. *Russell*; *Farrelly* v. *Farrelly*, op. cit.

[2] Ibid.

[3] Ibid. p. 75,158.

[4] Family Life Movement of Australia; Victorian Women's Refuge Group; Australian Federation of Business and Professional Women; Army of Men and Women; Parents without Rights (Vic); W.E.L.; Council of Social Service of New South Wales; National Women's Advisory Council; New South Wales Advisory Council to the Premier; Young Liberal Movement of Australia (NSW): L. V. Harvey; Marriage Guidance Council of Western Australia.

[5] Submission to Inquiry, vol. IV, p. 4219.

[6] Family Law Council—First Annual Report at p. 20.

[7] The Family Law Council informed the Committee that in December 1979 it informed the Attorney-General that it wished to withdraw its earlier recommendation made in the First Annual Report and to recommend that the Family Court be open in all cases, subject to the discretion of the court to exclude any person or persons.

[8] See for example submission of—Law Society of South Australia.

[9] See for example submission of—L. V. Harvey.

[10] Ibid.

[11] See for example submission of—Australian Federation of Business and Professional Women.

[12] See for example submission of—Marriage Guidance Council of Western Australia Inc.

[13] See for example submission of—Professor (now Mr Justice) Nygh.

[14] See for example submission of—Young Liberal Movement of Australia.

[15] See for example submission of—Law Society of South Australia.

[16] Submission to Inquiry, vol. I p. 489-490.

Chapter 10

FAMILY COURT COUNSELLING AND VOLUNTARY MARRIAGE GUIDANCE ORGANISATIONS

10.0 An important element of the conciliation service provided by the Family Court is the provision of counselling facilities. This adds a welfare dimension to the work of the court in making available to the court itself and to clients of the court the services of people trained and skilled in the technology and discipline of counselling. The Senate Standing Committee on Constitutional and Legal Affairs in its Report on the Clauses of the Family Law Bill 1974[1] recommended the establishment of the Family Court which 'will require new standards and methods, both in its physical environment, its procedural methods and its approach to marital problems'. The Committee observed 'it is essential that the activity of the court be seen as a 'team' operation, not in the traditional atmosphere of the judicial separation and inflexible division of functions'. The Committee stressed that the court must ultimately be perceived as a judicial institution. In reference to the judge the Committee said 'the judge must retain his clearly discernible role as a judge, not as a counsellor. He would control proceedings, advance optional solutions and create the 'climate' for settlement. But if there is no settlement, the necessary decrees must be judicial and must be seen to be judicial'.

10.1 The Senate Standing Committee concluded that the Family Court would require ancillary support at three levels:

(a) Welfare Officers who can talk to parties, evaluate custodial difficulties, report to the court and where required, provide on-going supervision of custody and access orders.

(b) Court counsellors who can counsel on marriage and personality difficulties.

(c) Legal advisers who can inform parties as to their rights, and as to the availability of legal and other community services.

10.2 In addition to ancillary services employed by the court, the Senate Committee identified a need for the use, on a consultant basis, of specialisations required in particular cases, e.g. psychiatric, psychological, voluntary marriage guidance and accountancy services. In regard to the expectation of the role of counselling entertained by the Committee at the time, it is pertinent to note para 44 of that Report:

> The Committee sees the creation of the Family Court of Australia as essential to give substance to the reconciliation provisions of the Bill. Under the existing Act reconciliation has not been effective. Reconciliation and counselling facilities must be available and be used *before* and at the early stages of matrimonial litigation if it is so to achieve effect. We see the new court as performing this positive role in reducing the area of disharmony and bitterness and facilitating the settlement of custody, access and property disputes.

Reconciliation and Conciliation

10.3 It is important to distinguish the process of conciliation and reconciliation in order to understand what follows. Reconciliation means the process of re-uniting spouses. Conciliation means assisting the parties to deal with the consequences of the

established breakdown of their marriage, whether resulting in a divorce or a separation, by reaching agreement or giving consents or reducing the area of conflict upon custody, support, access to and education of the children, financial provision, the disposition of the matrimonial home, lawyer's fees and every other matter arising from the breakdown, which calls for a decision on future arrangements.

10.4 Until the enactment of the Family Law Act the provisions of the law and the funding provided by the Commonwealth were directed towards reconciliation. The *Matrimonial Causes Act* 1959 provided in Part III for the recognition of marriage guidance organisations by the Attorney-General and for financial assistance from government funds to such organisations. Under the Act, a solicitor drawing up a petition or answer to a petition was under an obligation to bring to the attention of his client the provisions of the Act relating to reconciliation of the parties to the marriage and the approved marriage guidance organisations reasonably available to assist in effecting a reconciliation between the petitioner and the respondent. He was also obliged to have discussed with the petitioner (or respondent) the possibility of reconciliation.[2]

10.5 The provisions proved almost totally ineffective. The consensus among members of the legal profession at the time was that the requirement that solicitors comply with these provisions was an empty formality. Commenting on these provisions in 1972, Finlay and Bissett-Johnson said:

> Once the parties have got to the door of the divorce court, usually much time has gone by and they may have been apart for some time, indeed, they may have formed other attachments. At any rate their attitude to each other has had time to harden. If any positive benefit is to flow from reconciliation one would expect it to have a better chance of success if it were attempted at an earlier stage, such as if summary proceedings as for maintenance or custody are pending between the parties, at the time that the Magistrates' Court is being approached.[3]

10.6 The Matrimonial Causes Act also imposed duties on the court. A duty was imposed on courts 'to give consideration from time to time to the possibility of reconciliation of the parties to the marriage . . .' (s.14(1)). Provision was made for the judge to adjourn hearings and attempt reconciliation. S.15 gave recognition to the difficulty which may be experienced when a judge would proceed with a case in which he has attempted to mediate. For example, a party may have told him in confidence in his chambers something quite at variance with that party's sworn evidence in court. Therefore s.15 was inserted into the Act, making the continued hearings by a judge who had attempted conciliation dependent on the consent of the parties to the case.[4] The Maintenance Acts of Queensland and Tasmania also incorporated reconciliation provisions similar to s.14 of the Matrimonial Causes Act. Similar provisions are contained in s.14 of the Family Law Act.

10.7 It will be seen from the extract quoted from the Senate Standing Committee on Constitutional and Legal Affairs, para 44 that in framing the Family Law Act those responsible continued to attach importance to reconciliation counselling. Hence the Family Law Act gives support to marriage guidance organisations (ss.11-13) and seeks to promote reconciliation between parties (s.14(1), (2), (6). s.15(2)).

10.8 Organisations may apply for registration as approved agencies or for continued recognition as approved agencies under s.12 of the Family Law Act. An approved organisation may receive out of funds approved by Parliament such funds and upon such conditions as the Attorney-General may determine. This is subject to the organisation supplying the Attorney-General each year with an audited financial report and a report on its marriage counselling activities, including information as to the

number of cases dealt with each year. The Attorney may revoke his approval if the organisation does not adequately carry out its functions or does not engage in marriage counselling.

10.9 However, the Family Law Act went further by providing for counselling and welfare staff to be appointed to the court itself (s.37(8)). They are available, in addition to any other counselling agencies or voluntary organisations providing counselling or welfare services. The Family court counsellors are available to assist the parties to consider reconciliation, where possible, or to reach agreement on the settlement of their affairs. As the service has developed, the role of counselling as part of the conciliation process upon dissolution has become dominant. As the court counselling service has developed its potential has been recognised. It is now seen as providing parties with a means of avoiding costly court proceedings. Its role was described by Justice Elizabeth Evatt, in her Garran Memorial Oration.[5]

> The Court Counselling Service can help parties to come to terms with their own feelings, to reduce their hostility and to help them to reduce the areas of dispute. These are not idealistic phrases or wishful thinking. The Court Counsellors have developed new procedures and new techniques for conciliation as a means of resolving the immediate issue and of planning a practical arrangement for the future. The objective of this is to help the parties and the children to build a new life and new relationships.
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> The contrast between the conciliation process and court proceedings is striking. The Court is asked to find a once and for all solution with all ends neatly tied up. Where the parties are assisted by a counsellor to find their own solution, fluid arrangements can be made adjustable to meet the changing needs of people. The counselling process supports people and aims to build up their confidence and ability to cope. The courtroom process can be destructive of morale and can create bitterness for all.

Justice Evatt saw financial savings in encouraging parties to avail themselves of the counselling service at the court:

> The savings to the public purse would also be substantial in regard to the cost of maintaining the Court. It has been estimated that the cost of a half day court hearing is $575. The cost of counselling for the same period is $78 or about one-seventh of the cost of the hearing. The rate of settlement would need to be only modest to justify an increase in the capacity of the counselling service on sound economic terms. In fact, the position may be better than that. Counsellors have tended to get the most difficult cases at a late stage. Staff increases would enable early and more effective interventions. I appreciate that the savings I speak of would not be realised by reducing the numbers of judges or court room personnel. It is more a question of expanding resources to meet the increasing volume of work in the best manner. The employment of more counsellors would be more effective and less costly than the appointment of more judges.

10.10 It is also relevant to note that marriage guidance organisations no longer see themselves as involved simply in procuring reconciliation. The range of services provided through counselling by these agencies is now much wider. The range of services and the objectives of such organisations was described to the Committee by the Marriage Guidance Council of South Australia:

> Although one of the aims of the Council is to advocate a state of society in which the welfare of the family shall have primary consideration, the Council has never advocated the maintenance of marriage and family relations at all costs but consistently has stressed the value of responsible decision making, whilst advocating the acceptance by both partners of the on-going parental relationship with children. When it was previously discussed the Council supported, and still does, the concept of 'irretrievable breakdown' in marriage. Even before the commencement of the Act, people were being helped to separate from destructive marriages. With the upsurge in the number of divorces in recent years, counselling has increasingly involved divorce counselling: the purpose of which is to enable people to disengage from a marital relationship effectively and humanely, and in such a way that future relationships are not prejudiced by the divorce. We see that as part of our counselling service.
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> We are sufficiently committed to the aims of our organisations, however, to attempt the larger challenge of preventing the difficulties people experience in marriages from ending in divorce, our Educational Program has in recent years been committed to facilitating the development of healthier ways of relating in personal relationships, the dissemination of knowledge affecting those relationships and in providing a context whereby individuals, couples and even families can develop particular skills for the enrichment of their marital and family life.[6]

10.11 Approved marriage guidance organisations have stressed in their evidence to the Committee the importance of the provision of supportive services to those experiencing problems in their relationships. By educative and preventive programs many couples can be spared the trauma associated with marital breakdown. But it is important to note that the emphasis once put on reconciliation as an end in itself has to be markedly qualified in the light of contemporary knowledge about interpersonal behaviour. The Finer Committee considered the success of compulsory reconciliation provisions in legislation in Australia, New Zealand and New York State. It quoted the dilemma faced by counsellors when parties were, by legislation, required to attempt reconciliation as was the case in New Zealand. The Finer Committee quoted the following experience reported by the New Zealand Marriage Guidance Council which it describes as the voluntary organisation upon which, rather oddly, the whole legal pyramid of compulsory counselling rests.

> They (the counsellors) felt that while they should accept the client's decision to separate as a sign of real distress, they also had a duty to the courts to make sure that both clients had taken account of all the consequences of a separation — both for themselves and their family. This involves using every means to ensure that both clients are interviewed, no matter how unlikely it is that a reconciliation will result. In many cases where the clients proceed to a separation, after conciliation, they may be able to come to certain agreements without the intervention of the court. If this be so it is the duty of the counsellor to encourage them to take further advice from their solicitors to this end. In other cases separated partners may be helped to understand and accept some of the reasons for the breakdown of their marriage and supported during the subsequent weeks when they may feel loneliness, failure and guilt.

The Finer Committee commented:

> This perceptive passage may be interpreted as indicating the emergence in New Zealand of a pragmatic, working distinction between reconciliation and conciliation — terms which are used synonymously in the Domestic Proceedings Act. Reconciliation is being restricted to its proper meaning, that is, the action of re-uniting persons who are estranged; whilst conciliation is coming to denote, as it should, the process of engendering common sense, reasonableness and agreements in dealing with the consequences of estrangement.

10.12 Also reported were the findings of a legislative committee in New York State which consulted New York Attorneys concerning the work of the 'Conciliation Bureau' to which any plaintiff seeking a divorce must give notice. The law requires all parties to attend at least one conciliation conference at the bureau unless the Conciliation Commissioner for good cause decides that conciliation proceedings would serve no purpose. 'Conciliation' is used in the sense attributed to it above, as is 'reconciliation'.

> an overwhelming majority of matrimonial lawyers feel that the Conciliation Bureau is unsuccessful in reconciling married couples. The principal reason given for this failure is that a conciliation process which does not begin until a divorce action has been filed is too late to save the marriage . . . (but) although most matrimonial lawyers believe that the Conciliation Bureau has been unsuccessful in reconciling married couples a majority believe

that the Bureau has been successful in a significant number of cases affecting consensual agreements on custody of children, visitation rights and the amount of support. A substantial number of lawyers favour retention of the bureau mainly because the Conciliation Commissioners often have facilitated settlement of collateral issues. Supporters of the bureau indicate that such settlements save the judge's time, save trial and other costs, and promote family harmony, despite the divorce.

10.13 The Committee concluded on p.185 after noting a dearth of information about the value and effectiveness of marital therapy:

> Nonetheless, wherever one looks for the evidence, two propositions command general assent. First, that reconciliation procedures conducted through the court at the stage where parties are presenting themselves for decrees that will formalise their marriage breakdown have small success. Secondly, the conciliation procedures conducted through the court at this stage have substantial success in civilising the consequences of the breakdown. These conclusions are in themselves neutral upon the value and importance of reconciliation procedures conducted by other agencies and at a different time.

10.14 In Japan, according to a noted author,[7] a failure to reach agreement upon divorce where one party is anxious to have the marriage terminated, results in bringing the matter before the Family Court, which through its conciliation committee, will seek to effect either a conciliation and continuation of the marriage or, more frequently, an agreement concerning terms on which the marriage may be ended. In the overwhelming majority of cases, however, (greater than 90%), divorce is effected by extrajudicial agreement of the parties, and cases in which the courts must intervene are rare. The Japanese system cannot be used as an example of how to prevent divorces but it does serve as an example of how to deal with the problem of marriage breakdown in a straightforward way, aiming at the adjustment of conflicting interests of private individuals so that individual freedom is combined with flexibility.

10.15 The conclusion that appears to emerge from the foregoing is that the stress that has been placed on the role of counselling in reconciling estranged couples probably raises unreal expectations in the community as to what can be achieved by counselling. The community has available to it agencies equipped to engage in reconciliation counselling through the system of approved marriage guidance organisations. These bodies provide a valuable community service by their very variety. A statutory agency would not be able to cater to such a broad cross section of the community as that which can be met through a system which provides agencies tailored to different religious, cultural and ethnic needs as provided by funded agencies. The Royal Commission on Human Relationships noted:

> Community-based and voluntary organisations in spite of some disadvantages, are better placed to provide continuing education and counselling services, which otherwise tend to be bureaucratic and unavailable at weekends when crisis situations often develop. Our evidence suggests that people generally would prefer government assistance to be generously given to voluntary and community organisations to help them cope with their problems, rather than have other people's solutions imposed upon them.[8]

All of these agencies now stress the importance of funding so that programs can be developed to meet 'the need of those experiencing marital stress'. The Committee notes that the Royal Commission on Human Relationships in vol. 2 of its First Report (paras 31-47) emphasised the need for education in human relationships including marriage and family life and pre-marital education. The Committee is of the view that it is in these directions that the Commonwealth should be moving in regard to stabilising marriages and fostering the family as an institution. In funding voluntary agencies, the Attorney-General's Department currently emphasises the role of counselling in the breakdown situation. The concept of marriage counselling under the

Act should be expanded to take in a range of community support services and institutions providing an educative function. The education system is well placed to instruct in areas of personal development and interpersonal relationships. This, however, should not derogate from the role of the parents and the family and the role of the school in educating children about their own growth and development.

Recommendation 61

10.16 The Committee, in recognising the importance of the preventive approach, accordingly *recommends that Marriage Counselling be defined under the Act to encompass pre-marital counselling, marital counselling, pre-divorce counselling, supportive counselling during divorce and post-divorce counselling. The Committee further recommends that education for marriage and family life be further supported either by incorporating provisions in the Act or by reinforcing those in the Marriage Act.*

The Relationship between the Family Court and Approved Marriage Guidance Organisations

10.17 The Director of Court Counselling, Western Australian Family Court informed the Committee:

> It is not expected that Family Court Counsellors should engage in providing long term counselling support, and in one series of interventions with a family, three or four contacts is generally seen as the normal limit of involvement. Following this contact however, an invitation is invariably extended by the Counsellor to the client to initiate further assistance at a later time should this be required.
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> In cases where long term, ongoing counselling would appear to be beneficial to particular clients in terms of marital counselling, emotional support or adjustment or for personal development or for particular family relationship problems, the policy of the Court Counselling Service is to advise that the client or family accept referral to another agency, ensuring that ongoing support is available.

10.18 In a recent publication, an officer of the Family Court wrote:

> Although the Act appears to envisage Court Counsellors being available to assisting people at all stages of the marriage breakdown process, in fact, because of the availability of approved marriage guidance agencies in the community, and the need for Court Counsellors to establish priorities for their service, referral to other agencies is encouraged when marriage reconciliation, separation counselling and post-divorce counselling is required. The Counselling Service, at present, sees its major function as that of assisting people to resolve their disputes and problems over the custody of and/or access to their children before, during and after litigation. Allied to that task is the preparation of reports for the Court's use in such disputes.[9]

10.19 However, the marriage guidance organisations have reported to the Committee that this situation has not resulted in many referrals from the court to the organisations. Referrals are usually made (a) by telephone, where counselling secretaries refer people to other agencies in cases where this is requested, there are no court proceedings or it is difficult for the client to get to the registry, or, (b) by the counsellor after initial contact where there is the prospect of benefits from long-term assistance. The Marriage Guidance Council of South Australia, in its submission, reported that in three years of operation ony 25 people have been referred to their agency from the Family Court (as at January 1978). Commenting on the situation, the Director of the Marriage Guidance Council (S.A.) observed:

> Some of the difficulties envisaged in clarifying the relationship are:

(a) it is virtually impossible to legislate for relationships between the Court and the diverse body of organisations that comprise C.O.M.G.O.;
(b) relationships between the Family Court and approved organisations differ from State to State:
(c) the Family Court itself is developing a counselling division; and
(d) approved organisations may be wanting to dissociate themselves from legalistic considerations and preoccupations.

Notwithstanding these difficulties, it would be a pity if a workable relationship did not develop, or if the approved organisations and the Family Court were seen to be in competition. Since arriving in my position I have commenced talks with the Counselling Division of the Family Law Court in Adelaide to avoid this happening here, but could not the use of approved organisations be stressed more firmly and explicitly in the Act? Clearly the court counsellors are in a better position to advise and consult on matters pertaining to the law, whereas, as I speak from our own agency here, I believe we are in a better position to advise and counsel in terms of the human relations side of marital conflict.

10.20 The Director of Court Counselling Western Australia, noted three reasons for the failure of the relationship between the court counsellors and the guidance bodies to develop:

(1) The tendency for Court Counsellors to have become a specialised area attracting a particular clientele, most of whom present court related problems.

The specialised area of custody and access disputes for example would appear to be inappropriate for referral to another agency, remaining within the options of resolving problems with Court Counsellors or proceedings to legal action in the Court.

(2) The relative success of short term crisis model counselling, eliminating the need in many cases, to seek on-going support following a minimum number of Court Counselling contacts.
(3) The reluctance of some clients to go through the process of establishing a relationship at another agency. In such cases referral may not be completed as clients resist the process of revealing personal feelings to another agency.

10.21 The Principal Director of Court Counselling in his submissions commented critically on the work of the approved agencies, alleging that some of the low esteem in which counselling was held by the legal profession was attributable to them:

Some of the responsibility for this condition must be placed on the eagerness to approve agencies, many of religious orientation with little or no desire to audit administratively the effectiveness of the expenditure of funds. As a result, there has been no pressure to provide sufficient staff to effectively supervise the agencies. It is felt that the Matrimonial Causes Act made it possible for lawyers to treat counselling in a cavalier fashion. There have developed numerous agencies all requiring their own costly administrative structure with a draw on the public purse without any rationalisation of their service.

The Principal Director stated in his submission that he had, at an early stage, initiated contact with these agencies:

The court initiated the practice of having workers from the marriage guidance agencies in the counselling sections with a view to facilitating referrals. Wherever such contacts were attempted most eventually petered out. Similarly, attempts to develop mutual policy came to nought. In an endeavour to discover why such attempts failed it was found that there was considerable competition between agencies who feared that if other approved agencies were aware of their intention, they might devise strategies to get a disproportionate amount of the Attorney-General's money. Quite clearly such competition is wasteful.

The Principal Director of Court Counselling went on to recommend that the cost

effectiveness of agencies be assessed and agencies asked to demonstrate their interrelatedness with each other. He saw benefit in rationalisation over the area with agencies developing a joint policy to allow greater specialisation in the delivery of services in the area of marriage counselling. But the view of the approved agencies is different. It is interesting to note the perception of Mr L. V. Harvey, an officer of the Attorney General's Department in 1975, as to how relationships would develop:

It is clearly not the Government's intention that the counselling services of the Family Court should compete with existing marriage counselling services. Apart from insufficient staff numbers necessary to compete for clients I think it must be clear that the Family Court staff will have to develop a new and specialist role in the services of those in marital and family stress. In the main, the Family Court Counsellor will not deal with people on the continuing basis as a counsellor. For this service, clients will generally be referred to existing services. Thus, the Family Court Counsellor will have to develop the skills of a referral counsellor; the skills which realistically motivate a client to accept referral.[10]

10.22 There would appear to have developed mutual disappointment on the part of the court counselling service and the approved agencies. The Committee has had available to it papers written from each point of view. It is not for the Committee to attribute blame for this lack of mutual support, but reference is made to the views and recommendations in the section on 'Future Developments' which concludes this chapter. The solution would seem to require a decision as to the most appropriate point of access for the people wishing to use the service, that is to say, through highlighting the service provided through the court or establishing a service separate from the court. It is also essential to ensure that the service be equally available to the clients of all courts exercising jurisidiction under the Family Law Act. Publicity and educative programs are needed to promote awareness of the services available but not so as to create unrealistic expectations as to what might be achieved by counselling.

Co-ordination is essential between agencies so they are aware of the services they provide and can make effective arrangements for cross-referral. It is necessary to note that cross-referral involves welfare agencies other than family oriented voluntary agencies, such as the approved agencies. They include child guidance, psychiatric services, alcohol and drug re-habilitation, legal aid authorities and private solicitors.

Pre-Court Counselling

10.23 Pre-Court Counselling is an area of work which the court counselling service considers should be developed. It is considered that early intervention by the counselling service can have the double effect of relieving the marital distress of the separating couple and, possibly, pre-empting contested court proceedings at a later stage. The court has been hampered in developing this aspect of its work because of staff limitations over the period since the inception of the service and the pressure on the counselling service to meet the statutory requirement of serving the court.

10.24 In Western Australia, however, the development has not been subject to these constraints. The Director of Court Counselling of the Western Australian Family Court reported to the Committee that court counsellors are available to people regardless of whether or not legal proceedings have been taken or are being contemplated. It is not necessary for people to be taking legal proceedings before being eligible to seek assistance from the counselling service. In fact it is considered highly desirable if people approach the counselling service to discuss difficulties and possible solutions prior to initiating legal proceedings and this is generally encouraged.

Counselling under section 14 of the Act

10.25 The Committee was told by the Director of Court Counselling W.A. that the four parts of s.14, which provide for counselling services, are held by court counsellors to be of considerable importance to all litigants involved in acrimonious proceedings and indeed to many others, where the effects of unresolved conflicts may not be clearly evident in the pleadings of court proceedings.

10.26 With the main goals of counselling being to enable parties to talk to each other about differences and to attempt, by enhancing the communication process, to seek solutions to problems or to enhance understanding of each others feelings, one could safely claim that most court litigants could benefit from the process and that the provisions of s.14 could rarely be over-employed.

10.27 Some would argue that counselling should be extended to all persons making an application to the court following marital breakdown or separation, as an automatic process of the court, whether or not there is an indication that parties seek assistance or could benefit from it. The advantages of such a process would be that early intervention by counselling services, could prevent the development of hostile attitudes and acrimonious proceedings, as well as enable family members to examine with counselling assistance, the marital situation with regard to whether relationships can be improved and problems overcome.

10.28 The large number of applications filed in the court, both for principal and ancillary relief, would render it impossible for the already strained court counselling resources to be extended to all applicants. Even with an expansion of the role of approved marriage counselling agencies who are available as 'marriage counsellors' within the definition of the Act, it is unrealistic to believe that counselling services could be extended to all separating couples.

10.29 Another limitation of this process relates to the factor of 'compulsion' or merely 'going through the motions' as an automatic requirement. Experience has shown that this introduces a farcical element to the concept of counselling. It is suggested therefore, that while counselling facilities could undoubtedly assist more people than they currently reach, the service should not be 'enforced' on all divorce applicants automatically, as there is a consequent danger of counselling becoming seen as a process that everyone has to merely 'get it over and done with'.

10.30 It is noted that the issues of custody and access involving children of separated or separating parents is the main area where assistance is sought, when counsellors assist and enable parents to focus on the needs, rights and welfare of their children and to seek solutions to differences that they hold in this regard.

10.31 The classification 'psychological support' is another main area and includes such factors as couples seeking assistance with management of their decision to separate and people seeking support in coping with the effects of separation and adoption of a new life style associated with separation.

10.32 The third main area of self-referred clientele is that of 'marriage counselling' where assistance is available to people to examine their relationships, to identify problems or conflict areas, and to seek ways of overcoming difficulties, enhancing communication, relationships and the quality of family life. People may seek the assistance of court counsellors at various stages associated with marriage difficulties.

10.33 Ideally, court counsellors should be available by appointment or in urgent circumstances, a duty system should provide for seeing people who come 'off the street'. This happens in Western Australia, Tasmania and South Australia but to a much lesser extent in other States.

10.34 The percentage of non-court referred counselling is 38.5% for all registries taken together. In other words, slightly more than one-third of all the work of the Family Court counselling service was not referred to it by the court. On the registry by registry basis the percentages are as follows: Launceston 65%, Hobart 60%, Canberra 57%, Perth 52%, and Adelaide 49%. There are only three registries where the amount of non-court referred work is below the mean and these are Melbourne 10%, Parramatta 25% and Sydney 34%.

10.35 Whilst other agencies, including approved marriage guidance agencies, provide long term ongoing counselling support, the court counselling service is seen as a short term crisis oriented and problem centered approach to counselling. For this reason it is imperative that this service be available to people with a minimum of delay. The relationship between the demand for services and the counselling resources available requires close attention and regular review.

10.36 In Western Australia services provided by the State Family Court are not limited to the jurisdiction of the Family Law Act, with its Constitutional limitation to 'parties of a marriage', and consequently the court counselling service is available to people regardless of marital status. The service is extended to children not withstanding the marital status of their parents.

10.37 Clearly, it was the intention of those responsible for the Family Law Act that services should be available on the basis that they are provided in Western Australia. Section 16(2) of the Act provides 'a party to a marriage may seek the assistance of the counselling facilities of the Family Court or of a Family Court of a State, and the Principal Director of Court Counselling of the Family Court or an appropriate officer of the Family Court of that State . . . shall, as far as practicable make those facilities available'.

10.38 A clear inference to be drawn from this data is that the service provided in the States with smaller populations is much more comprehensive than in the State of New South Wales and Victoria where most people live. The situation in Victoria must be a cause for concern to anyone who believes that the counselling service should be readily accessible to people with marital problems.

Section 14(1) (a)

10.39 This section provides for utilisation of counselling services to enable parties to consider reconciliation and it is perhaps unfortunate that this section is rarely utilised. This situation arises as it is only indicated on very rare occasions in the court pleadings that counselling may assist or that there is doubt by one party or the other as to whether the marriage has in fact 'irretrievably' broken down.

Section 14(4)

10.40 This section provides for counselling to be directed or advised if the court, when granting an injunction, is of the opinion that it is in the interests of the parties or children to do so. Applications seeking an injunction are almost invariably indicative of an urgent crisis situation, where relationships are severely strained and communication is extremely poor. These factors usually require more than the granting of an injunction alone and a number of examples could be given where people in such

circumstances have benefited considerably in terms of a better future relationship and capacity to discuss areas of disagreement, following counselling assistance made available at the critical time.

10.41 Whilst counselling could never be seen as a substitute for the granting of injunctions, it should be seen as a process which can often assist the parties to the injunction to understand, overcome and cope with the difficulties being experienced in the family.

Section 14(5)

10.42 This section has the widest possible application of all counselling provisions in that it provides for the court to advise parties to attend counselling if it is of the opinion that counselling may assist the parties to improve their relationship with each other and to any child of the marriage.

10.43 Whether or not a reconciliation is a possibility, the goal of improving relationships, particularly where children are involved, is one that should generally be encouraged.

10.44 It has generally been found by court counsellors that early opportunity to assist people in this way, such as at the time of separation or shortly afterwards, tends to bring greater likelihood of beneficial results; that is before negative patterns of behaviour associated with the competing interests of the parties become too firmly established.

Section 14(6)

10.45 This section provides for compulsory consideration of the possibility of reconciliation with the assistance of a marriage counsellor for parties to a dissolution who had been married less than two years at the time of application.

10.46 The Principal Director of Court Counselling in his submission stated that many counsellors see s.14(6) as an unnecessary discrimination:

> It is one of those sections of the Act which tends to reduce the status of counselling to a mere formality, as most clients are quite indifferent to this sort of session. If one examines counselling statistics, it will be seen that the closure of s.14(6) interviews, is almost 100 per cent, which points to the fact that they are usually brief and one off.

The Principal Director recommended that s.14(6) be repealed. The proposal that s.14(6) be repealed was supported by marriage guidance councils and others working in the field of marital counselling.

10.47 A different position was adopted by the Director of Court Counselling, W.A., who observed that court counsellors have experienced mixed feelings as to the value of this provision and hold serious doubts as to whether it achieves the goal it was originally intended to serve; namely to protect the marriage of short duration by helping people who separate early in marriage to reconsider their position together in terms of whether reconciliation is possible or desirable.

10.48 One doubtful quality of the provision is that it does not require the parties to attend a counsellor jointly and what occurs frequently is that parties attend individually in order to comply with the requirement, but with no real thought of reconciliation. It is suggested that this provision would be more meaningful regarding its intention if the parties whenever practicable were required to consider the possibility of reconciliation as a joint process.

10.49 Very few cases referred to the court counsellors in Western Australia pursuant to s.14(6) involved a genuine consideration of the possibility of reconciliation, and most clients in such circumstances merely sought to comply with the requirements under the Act, claiming that reconciliation was not a possibility and then proceeding with the application for dissolution.

10.50 In making the observation, court counsellors initially felt that this was a misuse of already overworked counselling personnel but further analysis of the clientele in this category brought a realisation that the service was performing a valuable function which had not been intended by the Act. It was observed that a significant number of clients in this category were very young, and it was common for such people having suffered a broken marriage of short duration, to also suffer an enormous blow to confidence and self esteem. Such people are vulnerable to further unsuccessful relationships and in a number of cases Court Counsellors observed an almost obsessive desire to marry again as soon as possible, in order to 'prove their ability' to make a success of marriage.

Counselling for people in such circumstances can be beneficial in enabling them to understand what has occurred, and to enhance their self esteem and self confidence.

10.51 Such a service would have been unlikely to have been sought or made available without the requirement provided in s.14(6) and notwithstanding that the intention of the provision is rarely achieved and often farcically considered, the derivative benefits to a small but vulnerable group of people provide a valuable community service.

Counselling in relation to children

10.52 Part VII of the Act provides for use of court counsellors in the Family Court's jurisdiction over children, in several ways.

Conferences

10.53 Section 62(1) empowers the court at any stage of proceedings in which the welfare of a child under 18 is relevant, to direct the parties to attend a conference with a court counsellor in order to discuss the child's welfare and, where appropriate, endeavour to resolve any differences between the parties on matters affecting the child's welfare. Attendance at such a conference is not strictly compulsory, although the court counsellor is obliged, pursuant to s.62(3), to report to the court the non-attendance of any party at such a conference. Conferences are confidential in the sense that anything that is said on such occasions is not admissible in courts, as stated in s.62(5).

Welfare Reports

10.54 Apart from the convening of conferences, the Act makes provision for another distinct function for the court counsellors. Section 62(4) enables the court to adjourn proceedings pending the preparation of a welfare (or family study) report on matters which the court considers desirable, whilst s.63(2) provides for welfare reports in proceedings for a decree of dissolution of marriage where the court is in doubt as to whether proper arrangements have been made for the welfare of children.

10.55 When reports are called for it is clearly contracted with clients that all matters

discussed may be reported on, if appropriate, to the court but that the court counsellors are available to help the parties clarify and work out the issues and come to their own decisions. If not, a full report in contested custody and access matters is prepared. The admissibility of the family report as evidence in proceedings, requires certain accountability provisions and regulation 117 under the Act allows a court counsellor to be examined on a report. However, as the court counsellor is an officer of the court this cross-examination is usually limited to areas where clients deny what has been stated or where more information is required.

10.56 The initial stage during the preparation of such a report is for both parties to be seen for a joint interview in much the same way as a conference situation. Then, arrangements are made to visit the homes and observe the children.

10.57 The Committee was informed of a practice that has begun to develop whereby the judge will refer parties to what is called a reportable conference for a short oral report. This is done by judicious interpretation of s.62(1) and 62(4).

10.58 Section 62(5) is ambiguous in this regard when it provides for confidentiality but 'subject to sub-section (4)' which is the sub-section relating to reports. Interpretation of this provision has determined that for the purpose of a report being required by the court, conferences ordered under s.62(1) are not confidential. In complete contrast to the notion of confidential conferences, some registries, have developed a practice of ordering 'reportable conferences'.

10.59 This approach has been rejected in Perth, with strong emphasis being placed on the importance of confidentiality of conferences and the danger of preparing reports on assessments made under such emotionally charged circumstances as a conference in which competing proposals of parents are exchanged and discussed by the parents. The two processes are carefully separated, with the conferences being an opportunity under confidential conditions for parents to communicate with each other with the assistance of a counsellor.

10.60 It is strongly felt by court counsellors in Western Australia that confidentiality of conferences pursuant to s.62(1) is desirable and judges in the West Australian Court have strongly supported this policy, having required no reports relating to conferences.

10.61 The main dangers to the practice of reporting to the court on conferences can be described as follows:

(1) assessment made by counsellors under conference conditions which are usually stressful should be treated with caution, particularly as conferences usually only involve one contact by the counsellor with the couple;

(2) the more articulate client could attempt to 'impress' the counsellor under these conditions and gain support for his/her case through these means;

(3) the conference should not be a forum where the parties' main aim is to 'make a hit with the counsellors;'

(4) the counselling conference would no longer be seen as an opportunity for parties to reach their own decisions through a conciliation process. The conference which has to lead to a report would be seen as an extension of the judicial arm of the court, and the counsellors instead of helping people to resolve issues in a non-adversary way, would become part of the decision-making process of the court.

Recommendation 62

The Committee recommends that steps be taken to amend the Family Law Act to discourage the practice of ordering reportable conferences under s.62 and to preserve the original intention that where a counselling conference is ordered under s.62(1) it should be confidential.

10.62 Considerable criticism was expressed in evidence to the Committee, about welfare reports. The current thinking of the counselling service and the court itself is that resources should be diverted away from the reporting function towards a conciliation service which would strive to make early contact with the parties.

10.63 Whilst welfare reports are considered to be valuable in many types of cases, they have limited value if merely used to present information that could be made available in another way. If the limited resources of the counselling service were under constant pressure to meet an unrealistic number of orders for reports, the effectiveness and quality of the service would be severely reduced and there would be insufficient time to pursue the more significant conciliation role.

On-going Supervision of Custody Orders

10.64 In considering the court counsellor's function, it is also necessary to refer to s.64(5) of the Act which provides for supervision by welfare officers of the custody and access orders made by the court under the Act. This section which could place court counsellors in an inappropriate position of acting in an enforcement role has been clarified to some extent in discussions with Family Court judges.

10.65 Where this section is used, it is generally intended that it should be a way of putting people in touch with counselling resources.

10.66 Suggestions made to the Committee in connection with this matter, favour a review of all custody arrangements, a need to formalise the process of reviewing custody orders, and the need for a system of continuing supervision of a child of divorced parents.

10.67 Dr Pargiter, a Hobart psychiatrist submitted that extended supervision of custody can tie up the court counselling service. He considered that any continuing problems should be taken over by State welfare services.

10.68 The Director of Court Counselling, Western Australia, commented that since the operation of the Family Law Act in 1976, this provision has been the subject of a degree of misunderstanding and confusion as to the meaning of 'supervision' and varying expectations have been held by litigants and legal practitioners as to the role of the 'welfare officer' in relation to supervision orders.

10.69 The number of orders for supervision remained fairly static for the first two years of operation of the Western Australian court with a significant recent increase (44 orders since July 1978). In terms of legislative provision two suggestions have been expressed by the W.A. Court Counselling Service:

(1) the term 'supervision' is something of a misnomer, leading to a misunderstanding of the intended role of court counsellors and implying incorrectly an authoritative or 'police' role for the court counsellors;
more suitable terminology could be 'that a court counsellor be assigned to assist the parties and the children as far as practicable if required, in relation to matters affecting the welfare of the children:'
it is pointed out that court counsellors would be available on request even without such an order, but the order could be effective in terms of directing the service to extend itself in an on-going way to assist the development of better relationships in the family:

(2) the provision could be more meaningful if a period of time was specified in the order, suitable time periods ranging from about 3 months to 18 months and including interim periods pending disposal of proceedings.

10.70 The Committee notes these views but it is understood that the matter has been discussed by Family Court judges and counsellors and that agreement has been reached on the provisions of s.64(5). Therefore, the Committee favours the retention of s.64(5) as it allows discretion to be exercised, where appropriate, in making an order for supervision.

Counselling Services for Children

10.71 The Family Law Act makes no direct provision for the extension of the counselling facilities of the court to children. Court counsellors experience regular contact with children during their work. However, there is no provision for children to approach the court themselves for the purpose of seeking assistance from the counselling service.

10.72 In view of the known effects upon children of conflict between their parents and the separation of their parents, it is considered that the availability of counselling services at the request of children could be an important factor in helping children understand and cope with difficult and stressful crisis.

10.73 The Director of Court Counselling (W.A.) informed the Committee that on a number of occasions, counsellors were approached by children wishing to discuss their rights concerning custody or access, or to discuss other difficulties being experienced regarding their relationships with their parents. Despite the efforts of counsellors to understand and assist the child without undermining the parental rights, examples occurred where children proceeded to conflict with a parent on the basis of either a misunderstanding of what the counsellor had said or perhaps even a deliberate distortion of what was said, in order to pursue a desired goal in relation to a parent or parents.

10.74 The Director said that the response of the counselling service to this was to employ a policy of only seeing children on the basis of a court order or following the expressed permission of the custodial parent or parents. When approached directly by children, court counsellors now advise them to discuss the matters with their parents and that, if requested, counselling facilities could be available to parents and children jointly. This policy exposes a gap in welfare services as there is no service directly available to assist children in coping with the problems associated with the breakdown of their parents' marriage and conflict between parents, processes recognised as creating stressful and emotionally disturbing forces upon children. Should court counsellors be available directly to children without legal authority or legislative provision, their legal position could be seen as somewhat tenuous, particularly in view of the possibility of children misunderstanding or distorting counselling assistance and acting in a way that is seen by parents as undermining their authority.

10.75 The Family Law Council has directed its attention to this problem in its Third Annual Report (pp.12 and 13, paras, 63-74). The main points raised were:

(1) the lack of recognition of the right of a child to initiate proceedings and the limitation this places on the right of children under the Act;

(2) the reluctance of the counselling staff in the Family Court to become involved in assisting a child without the benefit of parental consent and thus the necessity of amending s.16(2) to allow a child to seek the intervention of a counsellor where this is necessary;

(3) the need for a special access document for children advising them of matters involved in custody and access arrangements.

10.76 It would seem appropriate that some provision be made in the Act that under some circumstances involving separation of parents or conflict between parents over custody or access issues, children may directly seek the assistance of the court counselling service. Provision could also be made requiring the court counsellor to notify the parents of the approach to the counselling service and to extend the facilities to the whole family if appropriate and required.

Recommendation 63

10.77 The Committee *recommends that s.16(2) of the Family Law Act which reads: 'A party to a marriage may seek the assistance of the counselling facilities of the Family Court or of a Family Court of a State, and the Principal Director of Court Counselling of the Family Court or an appropriate officer of the Family Court of that State as the case may be, shall, as far as practicable, make those facilities available' be amended by adding after the words 'a party to', the words 'or a child of'. This would allow a child to seek the intervention of a Counsellor where necessary and gives recognition to the right of a child to initiate proceedings.* The Committee further notes in this regard that as it is envisaged, the foregoing gives a wider role to the counselling service which could result in conflict with State welfare agencies. Where such conflict occurs, counsellors should refer the matter to the appropriate State welfare body.

Future Development

10.78 Depending on the view one takes of the kind and range of services that should be provided by the Family Court there are a number of possible paths along which development might proceed. It is evident from what has been said already, that there are problems facing the court regarding the provision of counselling services. The nature of these problems seems to vary from registry to registry and are determined by local conditions. Some of these problems arise because of the way services are being used. Thus, in the Melbourne registry, the general public appears to be denied any effective access to the counselling service which is fully occupied in providing the statutory services that it is required to perform under the Act. A recent staff utilisation review of the Melbourne registry firmly concluded that the problems of the registry, which involve a backlog of over 1,000 cases on the defended list, would best be overcome by encouraging the conciliation process. However, even if these recommendations are implemented, it would be some time before the counselling service was in a position to meet the demand for its services that might come from the community at large, that is to say, work not directly referred to it by the court. Registries in New South Wales and Queensland and South Australia, although coping, are using the counselling service in connection with listed cases and ready access is not available to clients with marital problems not yet involved in the court process. In Western Australia, as has been mentioned, the counselling service attached to the court has been able to develop a more comprehensive community service to those experiencing marital problems.

10.79 The Committee has already made the point elsewhere in the Report that ready access to the counselling services would appear to be the best hope of reducing the number of cases that are litigated. This view is widely held. Clearly, to provide the kind of service that would be available to ensure that the public has access to the

counselling services of the court, on the basis that prevails in Western Australia, would represent a very large commitment of resources by the Commonwealth. There is the danger also that by providing such a service, other existing services, such as those provided by the approved agencies or by the State governments might be duplicated. Any consideration of the problem must therefore ensure the co-ordination of services currently available to avoid administrative waste.

10.80 As well as the needs of the consumers of the services of the Family Court there is evidence of imminent need in other areas:

> Another matter which has caused concern to the Council is the lack of counselling facilities in magistrates' courts. For many people, the magistrate's court is the first point of contact with the legal system at a time of marital crisis. The Council felt that if it were possible to provide the services of trained counsellors at an early date in the breakdown not only might there be better prospects of reconciliation, but should breakdown ensue, the possibility of bitter disputes over custody and other matters might be lessened.
>
> Unfortunately, the counsellors attached to the Family Court have a very heavy workload of referrals from the Court's own system and are not able to take up any substantial amount of work from other sources.
>
> The Council drew this matter to the attention of the Attorney-General in a letter dated 21 October 1977. A committeee is considering whether there are any other community resources which could be brought in to assist in this matter. The needs of country areas may require special consideration'.[12]

10.81 It would be unrealistic to suppose that a service could be created that would meet the totality of this current need. It is essential therefore to ensure that the resources that are available are effectively used. This involves not only the court based service but those services in the community to which clients can be referred.

10.82 As far as the Family Court itself is concerned the Committee has already said that there should be the opportunity of all contested matters being referred, within a reasonable time, to a pre-trial conciliation process. This in itself will require a substantial addition to the staffing resources of the court particularly if the service is to be accessible to all citizens wherever they may reside. But it is not suggested that such an extension of the service would fulfil all the expectations of counselling, to which even the provisions of the Family Law Act give rise.

10.83 Ideally, it should be possible for any citizen experiencing marital problems to seek help at the most relevant time. Clearly such a service could not be provided by the Family Court, nor in the Committee's view would it be desirable that this should be the case. What is required is an intake or co-ordination service which can direct clients to an appropriate source of assistance. Currently, the Family Court attempts to fulfil this role but we have reported in paras 10.17-10.22, not to the satisfaction either of itself or other community based agencies. The alternative would either be to develop a court based service or create some other institution in the community that would meet this need, assuming that the jurisdictional difficulties can be overcome.

10.84 It is pertinent to consider the expectations to which the provision of counselling and welfare facilities attached to the court have given rise. In the first place the counsellors are there to provide a service to the court. In making reports the counsellors provide the court with information to assist the court in making orders. They also provide a service to facilitate the orders of the court when they supervise custodial placement or access. When undertaking conferences with parties at the direction of the court the counsellors are providing a conciliation service within the context of disputed proceedings. These activities may be perceived as being welfare functions undertaken on the court's behalf by the counsellors.

10.85 The Act clearly envisages that the service of marriage guidance counsellors (not necessarily employed by the court) should be made available in the circumstances envisaged by sections 14 and 15 of the Act. These have already been described. It is in this area that there have been suggestions that a conciliation role for the court through the counselling service could be developed. It is important to distinguish these aspects of conciliation from those that have been discussed elsewhere in the Report. Elsewhere we have used the term in relation to disputes that have been notified to the court. What is proposed is that people in the community should have access to the court counselling service as a means of resolving their problems, as an alternative to instituting legal proceedings. However, this is clearly pre-supposed by those making the suggestion.

10.86 The court counselling service has stressed, in recent papers, the need to develop the service in these respects. The court has been considering the proposal that would recognise the division in the work of the counselling service between the work undertaken directly at the order of the court and the service provided to the community.

This approach involves:

- community education programs
- Family Court information and filtering system
- conciliation procedures

10.87 The community education programs would provide information about conciliation services offered by the Family Court, information about other helping and counselling services and would aim to promote understanding of the behaviour norms for marital and family behaviour, both during marriage and following marriage breakdown. An objective would be to emphasise the services available to assist the individual to develop the capacity for solving his or her own problems through educational programs.

10.88 The information service conducted through the court would aim to direct people to conciliation opportunities and to make them aware of options open to them following family breakdown other than taking legal action. It would foster the idea of parties finding their own solutions based on information and advice.

10.89 The Conciliation service through the court would include:

- basic advice at the referral stage of marital discord;
- impartial legal advice through the court available to both parties together if so desired;
- counselling in relation to disputed issues involving the marital relationship, children and arrangements following separation. Parties with specific problems would be directed to appropriate agencies within the community. In the case of a child with behaviour problems for instance, the parties would be referred to an agency specialising in those problems or to a suitable program.

10.90 It is envisaged that where agreement is reached then legal services would be available through the court to have agreements ratified and consent orders made.

10.91 Although this is a laudable aim it goes further than is necessary, in the Committee's view, to meeting the immediate needs of the court. The provision of a total therapeutic and legal service in marriage breakdown situations would require a very large commitment of resources and would run the danger of duplicating many services that are currently provided elsewhere in the community. If the service so

provided were to remain part of the family court counselling service, it would give a therapeutic as well as a welfare role to the court's work. The aim of such a development would be to divert parties away from litigation towards a beneficial solution to their difficulties.

The Committee considers that if such a therapeutic service is to be provided in the community it should not be attached to the Family Court. The Committee notes the following passage from the Finer Report:

> The fundamental principle which must govern a family court is that it shall be a judicial institution which, in dealing with family matters can do justice according to law. This may seem to be so obvious a point as hardly to be worth mentioning; but the need to emphasise it arises from the nature of the jurisdiction which aims to do good as well as to do right.[13]

10.92 It was noted earlier that this was a point stressed by the Senate Standing Committee on Constitutional and Legal Affairs in making its recommendation. Later in the same passage the Finer Committee commented:

> The court must be seen by the men and women and children with whom it is concerned not as 'clients' and still less as 'patients' for whom the court process is one form of, or a preliminary to, 'treatment'. Professional staff serving the court, including any who are responsible for assistance to the court to reach sound conclusions on welfare issues, must be answerable to the court for what they do and how they do it. The aim must be to make adjudication and welfare march hand in hand but there should be no blurring of the edges either in principle or in administration. Through the family court it should be possible to make a new and highly beneficial synthesis between law and social welfare, and the respective skills, experience and efforts of lawyers and social workers; but the individual in the family court must in the last resort remain the subject of rights not the object of assistance.[14]

10.93 This is not to suggest that court counsellors should not perform any therapeutic role at all. It is of the nature of the 'crisis intervention' type case work undertaken by the Family Court, that counsellors will achieve effective changes in the outlook of parties with whom they are brought in contact. But it is the Committee's view that the activities of the counselling section should remain in the control of the court with the court taking ultimate responsibility for the work of the counselling section.

10.94 What seems to be required is a means to bring to the attention of the public the services which the court and other community agencies can provide. This includes the services that are now available and those that should be provided if the objectives of the Family Law Act, including those as stated in s.43, are to be realised.

10.95 It is absolutely essential in the Committee's view that counsellors be available at courts of summary jurisdiction. It is not only necessary that these services be provided to meet the statutory requirements under the Family Law Act. Courts of summary jurisdiction are the places where many marital problems will surface as was noted in para. 8.36.

10.96 Evidence available to the Committee suggests that if access to counselling services is to be of value then it should be available immediately it is required. Rural people are disadvantaged in this respect. Frequently their communities will not be served or inadequately served by counsellors from approved agencies. We have already suggested that the conciliation services provided by the Family Law Act should be made available more widely by the establishment of branch registries staffed by a registrar and counsellors. If such facilities were developed, it would be unfortunate if the services of the counsellors were not available to State courts serving the communities in which the services are located.

10.97 State governments should be assisted by the Commonwealth to provide a

comprehensive service to clients of court in the domestic relations area to enable them to offer the range of facilities to clients that the Family Court now offers. We would not envisage such a service being superimposed on the existing courts of summary jurisdiction. Rather we would see the creation by the States of special family courts as is proposed in para. 8.39.

10.98 These courts would have available to them the services of court counsellors. Given the existence of substantial resources available to the States in the welfare area it is not considered that the counselling service should be provided by the Commonwealth, although some court counsellors from the Family Court would be assigned to these courts on an exchange basis. The bulk of workers would be provided by the State government. The States would be assisted to establish these courts by the Commonwealth which could provide funding on a continuing basis.

10.99 The Commonwealth would fund the States to provide the services that are provided pursuant to federal law. It is recognised that the Commonwealth currently funds the States in respect of services provided by courts of summary jurisdiction under the Act. But it is envisaged that the Commonwealth and the States would co-operate to ensure a uniform and consistent level of legal services in domestic relations. This would be done in a similar fashion to the manner in which legal aid services are currently funded. Each State would establish a statutory authority, called the Domestic Relations Commission, to provide the services required. It would employ and deploy staff to the courts and would be responsible for constructing appropriate courts and facilities. It is anticipated that the service would be provided on a regional basis to ensure ready access by citizens. It would also play an important co-ordinating role in regard to the services provided by agencies providing services in the field of marriage counselling. It would be the responsible funding agency, rather than the Commonwealth, for approving the voluntary marriage guidance agencies. Federal funds for this purpose would be channelled through these agencies. It would be responsible for promoting the services available and providing educative material for media relay so that the range and level of services available would be adequately known in the community. One of its responsibilities would be to conduct training programs for workers in the marital counselling field, to conduct workshops to enable workers to develop techniques or to investigate new techniques and to sponsor visits from overseas experts. In co-operation with the Institute of Family Studies it would also facilitate and gather material for research in the area of family relationships, marital stress and breakdown. The Commonwealth would establish an agency with the overall responsibility of co-ordinating the services provided by the Domestic Relations Authority of the States.

ENDNOTES

1 op. cit. paras 38 and 39, pp. 12-13.
2 See Matrimonial Causes Rules, Form 3, 3A and R.15.
3 op. cit. p. 593.
4 Ibid. p. 594.
5 *The Administration of Family Law*, the Sir Robert Garran Memorial Oration, 15 November 1978, pp. 20-21 (Exhibit No. 3).
6 Submission to Inquiry pp. 676-677.
7 Max Rheinstein, *Marriage Stability, Divorce and the Law*, University of Chicago Press, 1972.
8 Report of Royal Commission on Human Relationships, Vol. 2, para 30.
9 A. Marshall, *Family Court Counselling Service*, Law Society Journal, June 1978.
10 L. V. Harvey, *Change and Marriage Counselling Services in Australia*, September 1975 (Exhibit No. 7).

[11] Evidence p. 6858 of Transcript of Inquiry.
[12] Second Annual Report of Family Law Council, 1978, paras 218-220.
[13] Finer Report op. cit. p. 175.
[14] Ibid. p. 175.

Chapter 11

THE COST OF PROCEEDINGS UNDER THE ACT

The Situation prior to the Family Law Act

11.0 In proceedings under the Matrimonial Causes Act the Court had a discretion to make such orders as to costs as it considered just.[1] However, as a general rule the husband paid the wife's costs irrespective of the outcome of the proceedings.[2] Furthermore, the costs of proceedings under the repealed Act were notoriously high. The Senate Standing Committee on Constitutional and Legal Affairs reported in 1974 that it had 'no doubt that the legal costs (incurred by parties in proceedings under the Matrimonial Causes Act) were too high, in some cases inordinately so'.[3] The Senate Committee considered that this was so largely as a result 'of the existing adversary system of determining matrimonial disputes'.[4]

11.1 The Senate Committee therefore endorsed the principle expressed in the Family Law Bill that each party to proceedings under that legislation should bear his or her own costs. Furthermore the Senate Committee considered that 'the establishment of a Family Court and the simplified substantive provisions of the Bill' would 'reduce the scope for legal disputation'. The Senate Committee was also 'of the view that the area of family law as encompassed by the Bill, is one which is appropriate for a wide application of the principles with respect to legal aid'. Accordingly, it proposed that the legislation should contain provisions conferring on a person who has instituted or proposes to institute proceedings under the Act the right to apply to an officer of the Family Court for legal aid.[5]

Provisions of Family Law Act and Regulations

11.2 The provisions in the Family Law Act and Regulations that can be grouped under the broad heading of provisions relating to 'the cost of proceedings under the Act', in fact cover four distinct issues. These four issues are:

— which party to the proceedings pays the costs of the proceedings;
— whether a party to the proceedings is entitled to legal aid;
— how much a solicitor acting in the proceedings is entitled to charge;
— what fees are payable to the Court in proceedings under the Act.

(1) *Provisions as to payment of costs as between parties:*

11.3 With regard to the question of which party to the proceedings pays the costs of proceedings, s.117(1) of the Act lays down the general rule that:

> each party to proceedings under this Act shall bear his own costs.

However, this general rule is stated to be subject to sub-section (2) of s.117 and to s.118.

Sub-section (2) of s.117 provides that:

> If the court is of opinion in a particular case that there are circumstances that justify it in doing so, the court may subject to the regulations, make such orders as to costs and security for costs, whether by way of interlocutory order or otherwise as the court thinks just.

11.4 Section 118 provides that the court may, at any stage of proceedings under the Act, if it is satisfied that the proceedings are frivolous or vexatious, dismiss the proceedings and make such orders as to costs as it thinks fit.

11.5 With regard to the general rule contained in sub-section 1 of s.117 that each party must bear his own costs and to the exception contained in sub-section (2) of s.117, the High Court has held[6] that as sub-section (1) is expressed to be subject to sub-section (2), the general rule must yield whenever a judge finds in a particular case that there are circumstances justifying the making of an order for costs. The High Court explained that a finding of justifying circumstances is an essential preliminary to the making of an order for costs under s.117(2). Furthermore the judge is not required as a matter of law to specify the circumstances which justify the making of the order under s.117(2) although 'it is not inappropriate that he should do so'.[7]

11.6 Once a court decides that there are circumstances justifying the making of an order for costs under s.117(2) the provisions of Reg. 173A become relevant. In addition to giving the court power to obtain information concerning the costs payable in the case (Reg. 173A(1) (a) (b) and (c) and Reg. 173A(2)), Reg. 173A requires that in making an order under s.117(2) the court must take into account the following:

- the financial circumstances of the party to the proceedings against whom the order is to be made;
- the availability of legal aid to the parties to the proceedings;
- the conduct of the parties at the hearing or determination of the proceedings including, without limiting the generality of the foregoing, their conduct in relation to pleadings, particulars, discovery, inspection, directions to answer questions, admission of facts, production of documents and similar matters; and
- all other relevant matters (Reg. 173A(1)(d)-(g)).

11.7 Regulation 173A also requires that in making an order for costs under s.117(2) the court must fix the actual amount of the costs to be paid pursuant to the order (Reg. 173A(3)). It should be noted that Reg. 173A was inserted into the Regulations by Statutory Rules 1979 no. 146, operative from 1 August 1979. S.R. 1979 no. 146 also repealed the former Reg. 173. The former Reg. 173 listed the factors of financial circumstances, availability of legal aid, conduct of the parties in relation to the proceedings etc., now listed in Reg. 173A(1) (d)-(g). But under the repealed Reg. 173 the court was only empowered to take into account those factors. It was not mandatory that it do so, as it now is. Similarly under the repealed Reg. 173 the court was only required to fix the amount of the costs as far as this was practicable.

(2) *Provisions as to legal aid:*

11.8 With regard to legal aid, the Act provides in s.117(3) that a person who has instituted a matrimonial cause or a person who is entitled to participate in proceedings under the Act either as a respondent or intervenor may apply to the Australian Legal Aid Office for legal assistance in respect of the proceedings. Section 117(4) then provides that where such an application for legal aid is made the Director of the Australian Legal Aid Office or an authorised employee of that office may authorise legal aid to the applicant in accordance with the means and needs tests of the Australian Legal Aid Office for the giving of legal assistance.

(3) *Provisions as to costs chargeable by solicitors:*

11.9 The matter of the costs chargeable by solicitors in proceedings under the Family Law Act was originally governed by two sets of regulations: the Family Law (Costs) Regulations and the Family Law Regulations (Reg 174-175). The Family Law (Costs) Regulations provided a composite fee for an undefended application for dissolution of marriage; a composite fee for other specified types of proceedings; a rate for professional time for all other types of proceedings, and a method of calculating additional charges for work not covered by the composite fee.[8] The Family Law (Costs) Regulations permitted a solicitor to enter into a written agreement with a client to charge fees other than those prescribed in the regulations. Regs 174 and 175 of the Family Law Regulations provided for the recovery of costs by solicitors and for the taxation of disputed costs.

11.10 On August 1 1979 Statutory Rules 1979 no. 147 repealed the Family Law (Costs) Regulations as well as Reg. 173[9] and inserted new regs 173, 173A-D, 176, 177 and 178 into the Family Law Regulations. The effect of these amendments were that all costs regulations are now incorporated in the main body of the Family Law Regulations. These amendments also effected a 20%increase in solicitors family law costs from 1 August 1979. It should be noted, however, that the former regulations still apply to work done prior to 1 August 1979.

The Provisions as to Court Fees

11.11 From the introduction of the Family Law Act on 5 January 1976 until 30 September 1976 all applications filed with the Family Court of Australia could be filed free. However, the *Family Law Amendment Act (No. 2)* 1976 which received assent on 29 September 1976 amended s.123(3) of the Family Law Act to allow the prescribing of court fees. Pursuant to this power the Family Law Regulations were amended to include Reg. 34A which imposes a fee in respect of proceedings for a decree of nullity or of dissolution. The Attorney-General in introducing these amendments made reference to the rising cost of legal aid and the fact that, of legal aid matters referred to private practitioners, 80% of the Commonwealth funds appropriated were in the area of family law. In view of this and in order to contribute towards this cost, it was considered that a fee of $60 was not unreasonable bearing in mind that a fee is imposed for the marriage to take place. This amount of $60 was in line with the amount of fees imposed under the Matrimonial Causes Act, on adjusted price movements since 1973. The comparative costs associated with the collection of this fee were not expected to be large as it would be a once-only imposition.[10] From 1 October 1976 until 1 November 1977 the fee payable was $60. Since that time the fee has been $100 per application. It is payable at the time of filing unless the Registrar is satisfied the applicant has been granted legal aid for the proceedings by an approved legal aid scheme, or that the payment of the fee would impose substantial hardship on the applicant.

The Submissions: Issues: Recommendations

11.12 The Committee wishes to draw attention to the fact that the submissions have been examined against the background that the regulations were varied in several important respects in August, 1979.

The Legal Profession

(a) *The amounts of costs prescribed by the regulations*

11.13 Members of the legal profession and organisations representing the legal

profession submitted that the costs scale is inadequate as to the amounts of the fees prescribed by it. It was strongly urged that the scale of costs prescribed in the regulations and the Legal Aid Scale of Fees be increased. It was stated that if the fees in both instances are not increased the inevitable result will be that the more skilled members of the profession will not be attracted to nor retained in the jurisdiction. Further, in the case of the 'costs regulations', practitioners will continue to meet the deficiencies in their charges by the practice of making an agreement to contract out of the costs regulations with their clients. This is permitted under Regulation 173D. It was submitted, therefore, that the attempt to control fees in the regulations is not successful because the rates are too low to be generally accepted by the profession.[11]

11.14 The Committee notes with concern the submissions of the legal profession and recognises that a fair and proper return for work done should be provided which should encourage a solicitor to accept that scale and not to resort to an agreement with his client to charge higher costs. So long as contested proceedings in the court are to be seen as adversary proceedings, the parties and the court need good quality legal representation because of the importance of the issues to the parties and the community. This need should be reflected in the costs regulations and in the Legal Aid Fees Schedule. The recent 20% increase in the amounts of costs, operative from 1 August 1979, is the first increase in costs since January 1976.

11.15 On 23 July 1979 Mr Justice Williams was requested to conduct a further inquriy into solicitors' costs under the Family Law Act. The terms of reference were to inquire into and recommend:

(a) the most appropriate form and structure of a scale of costs that a solicitor should be entitled to charge a client in proceedings under the *Family Law Act* 1975 and Family Law Regulations;

(b) the most appropriate amounts of costs to be fixed in such a scale; and

(c) the application of that scale, in relation to orders for costs as between parties made in such proceedings.

11.16 The Committee has considered the findings of the Williams Inquiry in so far as they apply to the terms of reference of this Inquiry.

11.17 The Committee agrees in principle with the findings of the Williams Inquiry as to the recommended adjustments in the level of fees for family law work.

11.18 A summary of the findings of the Williams Inquiry is set out later in this chapter.

(b) *The legal aid scale*

11.19 Prior to 30 October 1978, private solicitors who represented persons who had been granted legal aid by the Australian Legal Aid Office, were paid 90% of the fees payable under the existing Family Law (Costs) Regulations. Since that date payment to private solicitors in such cases has been made on the basis of a special legal aid scale approved by the Government.[12]

11.20 The Committee is of the view that a certain responsibility for providing legal services for those unable to pay ultimately rests on the individual lawyer. The Committee believes that every lawyer regardless of professional prominence or professional workload, should find time to participate in serving the disadvantaged. It notes that the participation of the legal profession in the provision of legal aid is of

long standing. Even in times when there were no formal private or public legal aid schemes, the legal profession frequently assisted those who could not afford the ordinary fees. The establishment of legal aid schemes provided funds to help defray some of the expenses incurred by the private profession and to provide a small reimbursement for the time spent in preparing legal aid work. It is the view of the Committee that the provision of funds from the government to legal aid schemes should be seen in this perspective, rather than as a guaranteed source of income for the profession. The scales of fees for legally aided work should reflect a contribution by the profession.

11.21 Further, the fixing of the Legal Aid Scale of Fees is an essential part of controlling the outflow of legal aid funds.

11.22 However, the Committee is fully conscious that a person who qualifies for legal aid has very little income or assets. Such a person needs an experienced family law practitioner able to give realistic advice, to steer the case towards a satisfactory settlement, or in the last resort, to present the relevant material to the court efficiently, if the case cannot be resolved through conciliation, and recourse to litigation is necessary.

11.23 It was submitted to the Committee that the objectives of legal aid may not be met without an increase in the Legal Aid Scale. It was suggested that if the rates are set too low, the inevitable result will be to push legal aid work to the less experienced and less efficient end of the profession. Inefficient or inexperienced legal representatives can contribute to delays and incur extra expenses which imposes a greater burden of costs on the legal aid funds, and on the parties.[13]

11.24 The Committee is of the view that the question as to whether there should be an increase in the existing scale of legal aid fees paid to the private profession is a serious matter and requires a more thorough investigation with legal aid authorities than the Committee is able to give within the ambit of its terms of reference. The Committee does, however, consider that the Legal Aid Scale of Fees should be subject to regular review to ensure that the welfare of those who cannot afford access to justice is being protected by access to experienced family law practitioners and that legal aid work is not being pushed to the less experienced and less efficient members of the profession because of low fees.

11.25 The issue of legal aid generally will be examined in detail later in this chapter.

Consumer, Church and other organisations, providers of legal aid and private individuals

11.26 The Committee is aware that in the interests of the consumer it is necessary to keep costs at a reasonable level and this is also the case in relation to legal aid funded out of public moneys. The consumer, church and other organisations some private individuals and some of the providers of legal aid stressed the financial situation of many of the parties to proceedings and the inevitably high cost of court proceedings. Most considered costs, especially the cost of defended proceedings, to be too high. Many submissions emphasised the need for sufficient funds to be allocated to legal aid organisations to ensure the provision of adequate aid so that the genuinely economically disadvantaged person has proper representation and advice. Others stressed the need for revision of the provisions for legal aid.[14] Importance was also placed on the need to retain the composite fee on the ground that it gives a basis on which to assess costs and an indication of the minimum fee involved. The matters

raised in these submissions are discussed in detail in the following paragraphs of this chapter.

Provision for legal aid

11.27 Provision for legal aid is seen as an important component of the legislative provision for costs. Supporters of the Family Law Bill envisaged that the difficulties which the economically weaker party might experience under the new provisions for costs would be largely overcome by the provision of legal aid.[15] In recent years there have been restrictions on the provision of federal legal aid through the Australian Legal Aid Office whilst the Government negotiated with the States for the introduction of its new comprehensive scheme. Under the new scheme, legal aid was to be provided in each State and Territory through a single independent statutory Commission, established by State or Territorial legislation. The Commissions were to take over the functions of the Australian Legal Aid Office. Commissions are now operating in Western Australia, South Australia and Queensland.[16]

11.28 The Means and Needs Test and Contributions Guidelines determine eligibility for assistance from the Australian Legal Aid Office on the basis of the inability of the applicant to afford the cost of representation in the particular case. A person comes within the guidelines if neither his disposable weekly income nor his assets exceed the prescribed amounts. The Guidelines of 30 October 1978 provide that aid will no longer be granted in dissolution proceedings unless circumstances exist which render it imperative that the marriage be dissolved and the applicant is in a position of special hardship. A minimum contribution subject to cases of real financial hardship has been imposed and the guidelines also provide for the merits of the case to be taken into account.[17]

11.29 From the submissions and evidence given to the Committee it appears the particular hardship to a party can arise in one of two situations:

(i) where neither party qualifies for legal aid and the party who is financially weaker (usually the wife) is unable to match the other party's capacity to bring or defend proceedings, nor unless special circumstances apply, can the financially weaker party recover any part of the costs from the other party;

(ii) where one party qualifies for legal aid and the other does not, the party who does not qualify for legal aid may be only marginally better off than the party receiving legal aid and therefore the party without legal aid may be limited in his or her ability to bring or defend proceedings in the Family Court of Australia when this is the appropriate avenue for relief.

11.30 In both situations many unjust settlements can result because the party without means accepts settlement rather than take the risk of heavy costs which are, with few exceptions, irrecoverable.

11.31 Within the ambit of its terms of reference the Committee has therefore conceived its duty in this area to be to consider how best the resources available for legal aid can be used to assist people who cannot afford to protect themselves or assert their rights at law in family law matters.

11.32 Several proposals brought to the Committee's attention are set out as follows:

(a) increase the budgetary allocation for legal aid in future years thereby enabling a wider access to legal aid.

(b) make the means test for legal aid more flexible: the main criticisms of the Means and Needs Test and Contributions Guidelines for legal aid in submissions and discussions were:

(i) the strictness and lack of flexibility of the Means Test Guidelines,

(ii) the possibility that the Means Test Guideline may not be uniformly applied,

(iii) the denial of aid to persons of small means who are not within the legal aid guidelines;

(c) treat the funding of legal aid as part of the welfare budget rather than as part of the costs of administration of the Attorney-General's Department;

(d) adopt procedures in ancillary matters under which greater emphasis is placed on assisting the parties to reach agreement thereby saving costs, legal aid funds and court time.

11.33 The Committee considers that these proposals require a more thorough investigation with legal aid authorities than the Committee is able to give within the ambit of its terms of reference. However, the Committee wishes to draw attention to the following matters:

(a) While the Committee makes no recommendation on the question of increased funds for legal aid and has not examined in detail any evidence on the adequacy of the legal aid budget, some members of the Committee are of the opinion that a substantial increase in the budgetary allocation for legal aid is needed to achieve a real answer to the problem. The Committee notes the recommendations in the Second Annual Report of the Family Law Council, paras 150-168, for the improvement of legal aid services.

(b) In operating a legal aid scheme, there cannot of course, be unlimited funds. Demands on the Government budget are immense. Competition for funds is fierce and is likely to remain so. The Committee notes that in 1978 approximately 80% of the funds which the Commonwealth committed to provide for legal aid in the Federal area, was used in the provision of legal aid in the Family Court.[18] On the other hand there is no doubt that equality of access to the courts and to legal assistance should not be denied to any person because of inability to afford the costs. In these circumstances the Committee believes that it is essential that the funds available for legal aid must be put to the best possible use in the areas of greatest need.

(c) In determining the cut-off point for a legal aid grant consideration must be given to the means and needs of the applicant, the costs of proceedings and to some extent, the merits or importance of the case. The question whether a person needs assistance in respect of particular proceedings depends not only on the weekly income and assets of that person, but on the expected overall cost of the proceedings While it may be reasonable to expect a person on the minimum wage to pay for proceedings which may cost $200-300 it may be out of the question for that person to afford $2,000-3,000. As to the merits or importance of a case it is difficult to formulate any satisfactory principle for determining the merits of a case for legal aid. These matters need to be regularly reviewed.

(d) The Committee draws attention to the view that legal aid for one party and a denial of aid to the other can result in unfair discrimination in many cases. This is especially so where the party denied aid is one whose income is just outside the legal aid limit. Such people do not enjoy an equal bargaining position. The argument is that the party with legal aid uses it as a weapon to destroy financial stability or to achieve settlement.

(e) The Committee considers that the third proposal (c) in para 11.32 ought properly to be the subject of further investigation. It considers that this is a policy matter for Government.

(f) The Committee endorses the policy of the Australian Legal Aid Office, (as set out in its submission to the Committee) for provision of legal aid in proceedings involving ancillary matters. Emphasis is placed on assisting the parties to reach agreement, thereby saving costs, legal aid funds and court time. Legal aid for custody, access and injunction proceedings is initially granted by the Australian Legal Aid Office only up to the filing of a defence. Further aid is considered on the submissions of copies of pleadings and any other relevant material so that the merits of the case can be considered as far as possible. Aid for property applications is initially granted up to the stage of a conference under regulation 96 of the Family Law Regulations. Further aid depends on the outcome of the conference. The Office concluded that in its opinion, more ancillary matters could be settled if greater emphasis is given, in the early stages of proceedings to encouraging parties in custody and access matters to attend counselling and, in contested property matters, to attend upon a registrar for a conference under regulation 96.

Recommendation 64

11.34 *The Committee, therefore recommends that the settlement of ancillary matters, that is custody, access, maintenance and property settlement matters, should be encouraged as far as possible.* Parties should be encouraged to bargain. By this means not only will legal aid funds be saved but also the burden on the courts will be reduced. Later in this chapter the Committee will recommend that the court's conciliation service be developed with a view to assisting parties in the settlement of ancillary matters.

Judicial discretion and the power to award costs

11.35 In their submission to the Committee the judges of the Family Court of Australia stated:

> Section 117 has not worked as intended, because the provision of legal aid is subject to severe restrictions. In many cases where neither party qualifies for legal aid, the party who is financially weaker (usually the wife) may be put to great expense to bring or to defend proceedings and is unable, unless special circumstances apply, to recover any part of the costs against the other party. While the old system was harsh to husbands, the present system can be harsh to wives.
>
> It may be preferable to allow the Court a wider discretion to deal with costs, particularly if it remains necessary to restrict the funds available for legal aid.[19]

11.36 Several other organisations submitted that:

(i) s.117(1) and (2) should be replaced by provisions which retain the present general principle but which furnish the court with adequate power to make discretionary orders for costs, to regulate the conduct of proceedings and to exercise discipline over the profession;[20] and

(ii) that the court should make orders as to costs where there is jurisdiction for doing so, rather than interpreting these sections of the Act in the restrictive manner which currently appears to be the case.[21]

11.37 There is no doubt that as far as extreme cases of vexatious litigation are concerned, the court is willing to make an order as to costs. The court needs such powers to deal with exceptional circumstances, in particular as a sanction against obstructive behaviour by a party in the course of proceedings. In moderate cases of obstructive behaviour, the exercise of a discretion can be made more difficult because in cases where neither party has reasonable means, and one may have legal aid, an order as to costs may just add to the financial hardship of the parties. However, where one party has reasonable resources and the other has not, there may be a case for awarding costs. Further, in all cases, where one party has reasonable resources and the other has not and is not eligible for legal aid, there may also be a case for considering an order for costs.[22]

11.38 In most cases, it is the parties themselves who decide upon dissolution, custody and access, maintenance and property adjustments, influenced to a greater or lesser extent by their predictions of the outcome a court would impose if they fail to agree. The possibility of not only paying his or her own costs, but also the costs of the other party may discourage a party from continually resorting to the court on unreasonable applications or from unreasonably delaying or opposing proceedings. Allowing the court a wider discretion to order costs against one or other of the parties may therefore also encourage parties to bargain and avoid the prospect of heavy unfavourable court costs. The Committee is of the opinion that parties should be encouraged to bargain and reach settlement and to avoid unnecessary and protracted litigation thereby saving costs to themselves and to legal aid funds. Judicial exercise of a wider discretion to deal with costs can assist with this objective.

Recommendation 65

11.39 For these reasons *the Committee recommends that the Family Court of Australia be allowed a wider discretion to order costs in proceedings under the Family Law Act.*

11.40 As an alternative means by which a wider discretion may be exercised, the Committee draws attention to the recommendations of the Law Council of Australia to the Williams Inquiry, that sub-sections (1) and (2) of s.117 of the Family Law Act be amended to read as follows:

(1) The court may in any particular case subject to the regulations, make such orders as to costs and security for costs, whether by way of interlocutory order or otherwise, as the court thinks just.

(2) In considering whether any and if so what order for costs should be made under this section the court shall take into account:
   (a) the financial circumstances of the person against whom the order is to be made and the financial circumstances of the person in whose favour the order is to be made;
   (b) whether the person in whose favour any order for costs may be made is in receipt of legal aid and if so, the terms upon which that person has received legal aid;
   (c) the conduct of all the parties to the proceedings from the commencement of such proceedings until their determination, including their conduct in relation to pleadings, particulars, discovery, inspection, directions to answer questions, admissions of facts, production of documents and like matters;
   (d) whether the proceedings have been necessitated by the failure of one party to the proceedings to have complied with the previous orders of the court;
   (e) whether one party to the proceedings has been wholly unsuccessful;
   (f) whether either party has served on the other party, proposals for settlement in accordance with the regulations, and the terms of such proposals for settlement;
   (g) any fact or circumstances which in the opinion of the court the justice of the case requires to be taken into account.

11.41 It will be recalled from what has been said earlier in this chapter that once a court decides that there are circumstances justifying an order for costs (under s.117(2)), it must take into account the following matters listed in Reg. 173A(1) (d)-(g):

- the financial circumstances of the party to the proceedings against whom the order is to be made;
- the availability of legal aid to the parties to the proceedings;
- the conduct of the parties at the hearing or determination of the proceedings including, without limiting the generality of the foregoing, their conduct in relation to pleadings, particulars, discovery, inspection, directions to answer questions, admission of facts, production of documents and similar matters; and
- all other relevant matters. (Reg. 173A(1) (d)-(g).

11.42 It will also be recalled that it only became mandatory for the court to take these matters into account after the amendments to the regulations concerning costs in August 1979.

11.43 It will be appreciated that factors (a)-(c) and (g) listed in the Law Council's proposed amendment to s.117(1) and (2), take in and expand on matters provided for in the Family Law Regulations, Reg. 173A(1) (d)-(g), as amended in August 1979. It is noted that it was on account of the amendments to the Regulations of August 1979 that Mr Justice Williams made no recommendation concerning the Law Council's proposals for amendments to s.117(1) and (2).[23]

11.44 Regulation 173A(1) (d) provides that the financial circumstances only of the party to the proceedings against whom the order is made, be taken into account. The Committee considers that the financial circumstances of both parties should be considered by the court when this is a factor in considering whether an order for costs should be made.

11.45 *Attention is drawn to the fact that regulation 173A(1) (e) provides only that* the availability of legal aid be taken into account. With the provision as it is the situation can exist where a person legally aided is disadvantaged as against one who is not. A person without legal aid may get their costs whereas one with legal aid will still have that taken into account in any application for costs. Frequently, the terms of legal aid on property settlements are that if a lump sum is paid to a person being legally aided, then the legal costs of the action may be repaid to the Australian Legal Aid Office out of the lump sum settlement. Therefore, that person may well have to refund the Australian Legal Aid Office out of any moneys received from a property settlement. At present the terms of legal aid cannot be put before the court without the appropriate member of the Australian Legal Aid Office giving evidence. This also creates difficulties. In these circumstances the Committee considers that the clause for legal aid, as a factor in considering whether an order for costs should be made, should be drafted to include reference to the receipt of legal aid and the terms upon which legal aid has been granted.[24]

11.46 Factors (d)-(f) of the Law Council's proposed amendment to s.117(2) provide for certain other circumstances not at present specifically incorporated in the Act or Regulations, to be taken into account when an order for costs is being considered by the court. With regard to factor (f) the Committee noted the Law Council's further recommendation to Mr Justice Williams that the Family Law Regulations would also need to be amended to provide that:

(a) a party to a marriage may serve on the other party to the marriage at any time either before or after the commencement of proceedings by way of matrimonial cause proposals for settlement;
(b) the proposals for settlement shall be in accordance with a prescribed form;
(c) the terms of any proposals for settlement served in accordance with this regulation shall be admissible in proceedings by way of a matrimonial cause in any court exercising jurisdiction under the Act only on the question of costs and shall not be disclosed to the court until all other matters except the question of costs have been decided by the courts in the proceedings to which such notice of settlement relates.[25]

11.47 The Committee considers that the inclusion of the factors listed for consideration by a court in deciding if any order for costs and if so, what order should be made in a particular case, in the Law Council's suggested amendment to s.117(1) and (2) of the Act, would provide for more specific guidelines, greater certainty and a wider exercise of the discretion to order costs than has been exercised under the Family Law Act. The Committee does not anticipate that the ambit of the discretion would be limited to a consideration of these factors alone.

Recommendation 66

11.48 *The Committee recommends, that all factors listed in the amendment to s.117 (1) and (2) of the Family Law Act, as proposed by the Law Council of Australia to the Williams Inquiry, should be included in the Act as factors to be taken into account when an order for costs is being considered by the court.*

11.49 With regard to the matter of appeals, the Committee draws attention to the fact that in the case of a totally unmeritorious appeal, that is to say, an appeal which the court thinks ought not to have been brought, the tendency is for the court to look favourably at an application for costs.

Proposal for settlement

11.50 The Committee considers that in maintenance and property settlement matters there is a need for importance to be attached to the concept of a proposal for settlement, ie. an offer to settle on a certain basis.[26] It is not envisaged that a party would ask for judgment but that an offer to settle would be made which would bear certain consequences. For example, if one party makes an offer to the other party that is rejected out of hand and the case goes to trial and that other party gets less than the offer, then there ought to be certain sanctions against that other party in the form of an order for costs. The party making the offer has been through all the delay and expense of the trial and will have incurred a large amount of costs when the other party has been unreasonable in negotiations.

11.51 The Committee is fully conscious that in some situations in the family law area, the concept of the offer to settle would be out of place. For example, in disputed custody applications which are pursued *bona fide* by the parties each believing that the welfare of the children will be best served if he or she has custody. Similarly there would be difficulty in applying this concept to proceedings for contempt. However, the Committee believes that the concept may well assist in questions of maintenance and property settlement. It is considered that just as the concept has acted as a damper on many unreasonable litigants in other courts, the concept if introduced into the Family Court, would act as a damper on many unreasonable litigants in that court.

Recommendation 67

11.52 *The Committee therefore recommends that the Act and Regulations be amended to provide specifically for the concept of a proposal for settlement and that where such an offer to settle has been made it should be a factor to be taken into account in the exercise of the discretion to order costs.*

The Filing Fee

11.53 Under Family Law Regulation 34A(1) a court fee of $100 is payable in respect of proceedings for a decree of dissolution or of nullity of marriage. Under paragraph (4) of Reg. 34 A the fee is not payable where the applicant has been granted legal aid or where 'payment of the fee would impose substantial hardship on the applicant'. Since October 1978, legal aid has not been available in uncontested dissolution applications unless circumstances render it imperative that the marriage be dissolved and there is special hardship. This has led to a significant reduction in the number of cases in which applications for waiver of the filing fee have been applied for or granted. In the period 30 October 1978 to 30 June 1979 inclusive, in New South Wales and Victoria, there were 14,238 applications for dissolution. Of these, the fee was remitted in 756 cases and grants of legal aid were given in 479 cases.[27]

11.54 It was submitted to the Committee that the filing fee should be abolished or reduced or that steps should be taken to make it easier for people to claim an exemption from the fee.[28]

11.55 In the view of the Committee the fee is a necessary and proper part of dissolution proceedings and should be borne by the user of the court's services. However, the Committee also believes that the fee should not impose hardship on a financially weak party and possibly prevent such a party from instituting proceedings for a decree of dissolution or of nullity of marriage.

Recommendation 68

11.56 *The Committee therefore recommends that the fee should not be abolished but should be reduced and that steps should be taken to amend the Regulations to broaden the circumstances in which the exemption can be claimed.*

11.57 The Committee notes that the regulations do not provide for the refunding of fees once paid. Therefore a party seeking a refund of the filing fee on a dissolution application in circumstances where that party has filed an application without being aware that the other party to the marriage has already filed a dissolution application, cannot claim a refund of the fee. In the Committee's view, this situation is unfair to the party making the second payment.

Recommendation 69

11.58 *The Committee therefore recommends that the Regulations be amended to provide for the refunding of the filing fee to a party making such a request in circumstances where that party has filed a dissolution application without being aware that the other party to the marriage has already filed an application at an earlier date.*

Appeal Costs Fund

11.59 The Committee draws attention to the proposal of the Family Law Council, Third Annual Report 1979, that an appeals costs fund be established. The costs of an appeal are high and the Full Court seldom orders costs to be paid in an appeal. There are approximately three hundred appeals lodged each year with a filing fee of $150 each. The total amount is approximately $40,000-45,000. Although the appeals fund would not come from that money, all the court fees go to consolidated revenue and a grant approximate to that amount would cover an appeals fund account.

11.60 It is considered that the persons entitled to be indemnified from such a fund would include:

- parties involved in an abortive hearing due to the illness of a judge or inability of a judge to complete a hearing (only costs thrown away would be recoverable);
- successful appellants;
- respondents, whether successful or not.[29]

Recommendation 70

11.61 The Committee accepts in principle these recommendations of the Family Law Council and *recommends that action be taken to establish an appeal cost fund in the federal area as such, including the Family Court of Australia.*

Bargaining and Conciliation and Counselling

11.62 When considering the cost of proceedings it is necessary to draw a sharp distinction between the actual divorce proceedings and proceedings about custody, maintenance or property. The divorce proceedings are usually dealt with quite separately from the other matters. Divorces are almost always uncontested and take only a short time in court. The balance of time is spent on matters such as custody, property and maintenance. The costs incurred by parties in these court proceedings are high and in the view of a number of submissions made to the Committee this is the result of the existing adversary system. It is noted that the High Court has determined that proceedings in the Family Court are of an essentially adversary nature: *In re Watson* (1976) FLC 90-059. The Family Court's power to limit proceedings is thereby reduced.[30]

11.63 The Committee regrets that proceedings in the Family Court should be seen as of an essentially adversary nature. It refers to the view of the Senate Standing Committee which is stated as follows:

> It is essential that the activity of the court be seen as a 'team' operation, not in the traditional atmosphere of the judicial separation and inflexible divisions of functions. The Family Court of South Australia, although in its infancy, is a worthwhile example of such team activity. The judge should nonetheless retain his clearly discernible role as a judge not as a counsellor. He should control proceedings, advance optional solutions and crate the 'climate' for settlement. But if there is no settlement, the necessary decrees must be judicial and must be seen to be judicial.[31]

The Committee believes that conciliation is a better way of resolving cases than contested litigation and refers to the positive steps it has recommended earlier in this Report to encourage and facilitate the use of pre-trial procedures that aim to promote agreement. It is in the interests of the public, the parties and their children that the law

should encourage the 'private ordering'[32] of the parties affairs. Where satisfactory bargaining agreements and settlements can be reached, cost are kept down, delays avoided and the bitterness between the parties kept to a minimum.

11.64 The Committee considers that one of the most effective and economical ways to reduce contested litigation under the Act is to develop the Court Counselling Service and the staff registries so that as early as possible, the parties (whether on their own initiative, or on the advice of their lawyers, or on the order of the court), may use the procedures under the Act, that aim to promote agreement. In custody and access matters parties should be encouraged to attend counselling, and, in contested property matters, to attend upon a registrar for a conference under Regulations 96.

11.65 Further, it was suggested to the Committee that the development of the court's conciliation service would result in savings to the public purse in regard to the costs of maintaining the court. It has been estimated that the cost of counselling for half a day is about one-seventh the cost of a hearing for the same time. The appointment of counsellors is less costly than the appointment of judges.[33]

Recommendation 71

11.66 *The Committee therefore recommends that the court's conciliation service be developed where necessary to encourage parties to bargain and negotiate and settle out of court.* This would reduce waiting time for cases, save costs to the parties and it would save public funds now committed to legal aid. It would lessen the pressure on the court and avoid the necessity of making further judicial appointments.

Taxation of solicitor/client costs

11.67 In submissions to the Committee, it was stated that not many people know they have a right to dispute the solicitors' fees by applying to the court for a taxation of solicitor/client costs.[34]

Recommendation 72

11.68 *The Committee therefore recommends that the right to taxation be more widely drawn to the public's attention and be included in material published by the court for the information of the public.*

Simplified procedures, joint applications for divorce, consolidated hearings

11.69 The Committee has examined the issues relating to simplified procedures, joint applications and consolidated hearings in earlier chapters. What the Committee wishes to emphasise is that such changes in procedures will provide a better chance of parties getting together and working out a settlement, reduce delays in court hearings, and bring about material savings in costs, both to public and private funds.

Summary of Report by Mr Justice Williams following Inquiry into Costs

11.70 Attention is drawn to the findings of the Family Law Regulations, Inquiry into Costs, Report by Mr Justice L. H. Williams Melbourne, 21 December, 1979. The Committee notes recommendations to:

(1) the hourly rate;
(2) composite amounts of charges for undefended divorces;
(3) form and structure of the scale for other matters;
(4) scale of costs for additional work;
(5) additional charges;
(6) adjustment of amounts of costs;
(7) agreements as to costs;
(8) remuneration for conveyancing work;
(9) counsel fees;
(10) solicitor/advocate;
(11) witness fees;
(12) s.117—Regs. 173A and Form 33.

Amounts of Costs, Form of the Scale of Costs, Indexation

11.71 The Committee agrees in principle with the findings of the Williams Inquiry as to the recommended adjustments in charges for family law work summarised below.

(a) *The Hourly Rate*

11.72 The present Regulations prescribe a rate of $48 an hour in respect of professional time spent in relation to the proceedings concerned. The scale of costs proposed by the Law Council of Australia was based on hourly rates of $60.39 for work performed by solicitors. On the other hand the Commonwealth submitted that there should be no further increase in the hourly rate which is now $48.00.

11.73 Mr Justice Williams did not accept the Commonwealth's submission that the 20% increase in August 1979 was sufficient to cover the total of the cost increases which have occurred during the period from 5 January, 1976. He was of the view that a further increase in the hourly charge rate is justified. He concluded:

> Of the two approaches which have been put forward, I prefer that advanced by the Law Council because, with all its defects, it enables a calculation to be made as to the appropriate level of costs on an estimation of the salaries at present applying. On the other hand the Commonwealth's approach involves the application of adapted indices to an amount of costs for which the basis is not statistically known.
>
> The above discussion helps to highlight some of the difficulties in bringing the rate adopted in 1976 up to date. In addition, the Law Council disputed the appropriateness of the scale of costs recommended by the Burnett report and stated in its reply to the Commonwealth that there was inadequate consultation with the Council regarding that report. Nevertheless, it was not able to establish that the amount recommended in that report was inappropriate.
>
> Whichever approach is adopted, a certain amount of judgment is necessary and regard must also be given to the conflicting views expressed in the submissions,
>
> namely:
>
> the consumers,
>
> the providers of legal aid,
>
> the solicitors and the Judges of the Family Court, some of whom have expressed the view that the present level of costs does not attract many of the more experienced practitioners to the jurisdiction.
>
> For all these reasons I am of the view that $52.00 is an appropriate hourly rate and I recommend accordingly. As indicated above, in reaching this conclusion I have relied, in the main on the approach put forward by the Law Council. This conclusion is supported, in my view, by the attempted updating of the amounts based on the Burnett Report. (The Williams Report pp. 41-42).

(b) *Composite Amounts–Form and Structure–Additional work and charges:*

11.74 Mr Justice Williams also made specific recommendations as to:

- *Composite amounts of charges for undefended divorces:*
  Regulation 173C(1) (b)—increase to $275 and $210 respectively;
  Regulation 173C(1) (a)—increase to $223 and $158 respectively;
  In His Honour's view the work covered by the composite charges should be more specifically described in the Regulations than at present, and Regulation 173C(6) be deleted.
- *Form and structure of the scale of other matters:*
  Mr Justice Williams recommended that:
  For each of the widely used proceedings amongst those presently covered by Regulation 173C(2) a rather more detailed description of the work involved up to the first return date should be prescribed up to that point. For additional work and for proceedings outside the types of actions covered by the composite amounts, including proceedings in courts of summary jurisdiction, a short scale of costs should be prescribed. He therefore recommended the following basic composite amounts.
  (a) Amounts recommended for proceedings for an order under ss.74,78,79 and 83 (items listed) in the Family Court, a State Family Court or Supreme Court: $163 where the solicitor has employed another solicitor or his agent to instruct counsel to appear personally for the applicant and $215 in any other case.
  (b) Amounts recommended for proceedings for an order under s.64 of the Act (items listed) $198 and $250 respectively for proceedings in the Family and Supreme Courts. In courts of summary jurisdiction the general scale should apply.
  (c) Amounts recommended for proceedings under s.114 of the Act (items listed) $217 and $270 respectively for proceedings in the Family and Supreme Courts. In courts of summary jurisdiction, the general scale should apply.
- *Scale of costs for additional work:*
  (a) $52 per hour for work not listed and which exceeds the periods prescribed.
  (b) Matters listed (amounts specified).
- *Additional Charges*
  Mr Justice Williams proposed the addition of the following (paraphrased below):
  Charges may be made if the registrar of the Court or the taxing officer has certified that he is satisfied that such a charge is justified having regard to the following matters:
  (i) the complexity of the matter or the difficulties or novelty of the questions raised by it;
  (ii) the skill, specialised knowledge, responsibility or demands upon the solicitor involved in the matter, particularly any steps taken by the solicitor which have led to the simplification of the proceedings or any significant saving of costs to the client.
- *Adjustments of amounts of costs:*
  No recommendation except to bring up to date the calculations set out in the Report. His Honour recommended this be done annually.

11.75 In summary, His Honour recommended that with regard to the structure of the scale of costs:

(a) The structure of the scale of costs which I recommend is therefore to provide a composite fee for undefended divorces, based on the work normally performed with provision for extra payments in the more difficult cases. This is substantially in conformity with the present Regulations.

(b) As to other proceedings I recommend that, apart from courts of summary jurisdiction, composite fees should be provided up to the first return date in those which are mostly used. (This, incidentally, is in line with the recommendations of the Burnett Committee reports). For additional work and for proceedings not covered by the composite amounts, I recommend a short scale based on the work involved. (The Williams Report p. 60).

Contracting Out, Conveyancing Work, Counsel Fees, Solicitor/Advocate, Witness Fees, s.117

Agreement as to costs

11.76 The Law Council suggested that the following principles should be included in any provisions as to agreements:

(1) The Agreement must be in writing.
(2) The terms of the agreement must be just and equitable.
(3) The agreed remuneration or basis of remuneration must be fair and reasonable having regard to the allowances set by the statutory scale of fees, charges and allowances.
(4) The client must be advised of the content off the statutory scale and advised of the desirability of taking independent advice before making an agreement.

Mr Justice Williams recommended the addition of the following:
The client must be advised of the content of the statutory scale and advised of the desirability of taking independent advice before making an agreement. (The Williams Report, p. 66).

Conveyancing Work

11.77 Mr Justice Williams referred to a proposed scale of costs of remuneration for conveyancing work arising out of business subject to the provisions of the Family Law Act, or regulations thereunder. He took the view that the necessity for such a provision was not demonstrated and made no recommendation about it.

Counsel Fees

11.78 His Honour recommended the following provisions:

Such counsel fees as are considered fair and reasonable by the registrar of the Court or the taxing officer shall be allowed where the trial Judge so certifies or where the party concerned has requested in writing that counsel should be employed. Subject to Regulation 176 the fees so approved shall be regarded as a disbursement properly incurred for the purposes of these regulations. (The Williams Report, p. 68).

Solicitor/Advocate

11.79 Mr Justice Williams recommended that:

Where a solicitor acting for a party to proceedings also acts as the advocate at the hearing he shall be entitled to such additional fee as is considered by the registrar of the Court or the taxing officer to be appropriate. (The Williams Report, p. 69).

Witness Fees

11.80 Mr. Justice Williams recommended that:

> Witness fees shall be allowable in accordance with the scale of witness fees prescribed by the Supreme Court in the State or Territory concerned and shall be regarded as disbursements properly incurred under these regulations. (The Williams Report, p. 70).

Section 117–Regulation 173, 173A and Form 33

11.81 Mr Justice Williams drew attention to the recommendation of the Law Council of Australia for amendments to s.117 and regulations 173, 173A but he made no recommendation about the proposals. However, His Honour specifically drew attention to the suggested Form 33, Proposal for Settlement. His Honour also drew attention to Sub-Regulation 2(b) in the Law Council's suggested Regulation 173 which provides for the court to make an order that costs be taxed.

ENDNOTES

[1] Matrimonial Causes Act s.125.

[2] Finlay and Bissett-Johnson 'Family Law in Australia' op. cit. p. 429-431; and Kerry A. Peterson 'Cost Sharing under the Family Law Act' 54. ALJ p. 269.

[3] The Law and Administration of Divorce and Related Matters and the Clauses of the Family Law Bill 1974 by the Senate Standing Committee on Constitutional and Legal Affairs para 84. See also Nygh 'Guide to the Family Law Act' op. cit. p. 5.

[4] Senate Standing Committee on Constitutional and Legal Affairs Report para 84.

[5] Ibid.

[6] *Penfold* v. *Penfold* (1980) FLC 90-800.

[7] Ibid.

[8] The composite amounts prescribed by Reg. 5 of the Family Law (Costs) Regulations were:
— for a decree of dissolution where there is a child of the marriage under 18—$200;
— for a decree of dissolution in any other case—$150;
— for proceedings under Part VII and VIII or s.14 of the Act or under Part XV of the Family Law Regulations: if the application is in the Family Court, a State Family Court or a Supreme Court of a State or Territory—$200; if the application is in a court of summary jurisdiction—$120.
— for any other proceedings under the Act or Regulations—$40 for each hour or part of an hour of the professional time reasonably spent in relation to the proceedings.

[9] See para 11.7 above.

[10] Parliament of the Commonwealth of Australia—House of Representatives 1976—Debates p. 855.

[11] For example submissions by: The Judges of the Family Court of Australia; Law Council of Australia; R. A. Lawson and Company; Professor David Hambly; J. Wade.

[12] Third Annual Report of the Family Law Council, 1979, para 235.

[13] For example submission by the Judges of the Family Court of Australia.

[14] For example, submissions by; Women's Electoral Lobby, Office of Women's Affairs, Department of Home Affairs; Church of England Social Questions Committee (Diocese of Melbourne); His Eminence Cardinal Sir James Freeman; The National Council of Women of Australia; National Marriage Guidance Council of Australia; Catholic Family Welfare Bureau; The Australian Legal Aid Office.
Note also: Commonwealth Legal Aid Commission 1st and 2nd Annual Reports, 1977 1978–79 and Family Law Council 2nd and 3rd Annual Reports, 1977–79 paras 150-170 and paras 233-246 respectively.

[15] The Sir Robert Garran Memorial Oration, 15 November 1978 Adelaide, 'The Administration of Family Law' Justice Elizabeth Evatt, p. 15. Note also Third Annual Report of the Family Law Council, 1979 para 236.

[16] Commonwealth Legal Aid Commission, First and Second Annual Reports, 1978, 1978–79.

[17] Ibid.
Note also: Third Annual Report of the Family Law Council 1979, para 234.

[18] Commonwealth Legal Aid Commission, First Annual Report 1978, p. 14 para 7.1.

[19] Paras 28, 19. See also evidence p. 67.

[20] For example submission by the Law Council of Australia.

[21] For example submission by the Women's Electoral Lobby. See also submission by M. A. Paul. However, the Evangelical Alliance of Western Australia submitted that:
> In keeping with the no-fault concept it is appropriate that the present system be maintained whereby costs are not awarded to either side (except if one party causes to be incurred for frivolous and vexatious purposes) particularly as a large percentage are funded by Legal Aid.

[22] Evidence 5809-5810, 5812-5813. See also submission by the Victorian Council of Social Services.

[23] See the Williams Inquiry, December, 1979, pp 70-74.

[24] See recommendation of the Law Council to the Williams Inquiry, 21 December 1979 pp 70-74.

[25] Ibid.

[26] See also submission of the Law Society of South Australia.

[27] Commonwealth Legal Aid Commission, Second Annual Report 1978-79, p. 14 para 7.6; Third Annual Report of the Family Law Council, 1979 p. 38 para 2.30.

[28] Law Society of South Australia; Fitzroy Legal Service; Australian Federation of Business and Professional Women; Australian Council of Social Services; Women's Electoral Lobby; Office of Women's Affairs, Department of Home Affairs. Note also: Family Law Council Third Annual Report, 1979 paras 229-233.

[29] Third Annual Report of the Family Law Council, 1979, paras 212-224. See also Law Council of Australia, para 9.6, recommendation 34; Evidence 29 November 1979 p. 6813.

[30] 'The Administration of Family Law' p. 16.

[31] Senate Standing Committee on Constitutional and Legal Affairs Report on the Law and Administration of Divorce and Related Matters and the Clauses of the Family Law Bill, 1974, para 39.

[32] R. Mnookin, 'Bargaining in the Shadow of the Law'.

[33] 'The Administration of Family Law', p. 21.

[34] For example: Submission by the Judges of the Family Court of Australia, para. 32; Professor David Hambly, para 61; Evidence 6 July, 1979, pp 5810-5812.

18 July 1980

P. M. RUDDOCK
Chairman

DISSENTING REPORTS

Pursuant to clause 12 of the Committee's Resolution of Appointment, the following members of the Committee have lodged protests and dissents to the report of the Committee:

1. Senator Missen.
2. Mr A. C. Holding.
3. Senator Coleman, Dr N. Blewett and Senator Melzer.
4. Senator Walters.
5. The Hon. K. M. Cairns and the Hon. R. C. Katter.
6. Mr J. R. Martyr.

DISSENTING REPORT BY SENATOR MISSEN

I support the great majority of the recommendations contained in the Committee Report. I believe the Report's basic conclusions are sound and are the result of an intense examination of the Family Law Act and the operations of the Family Court. They deserve close attention by the public and the Parliament but there are certain recommendations and lack of emphasis that are the cause of this dissent.

I believe that the Family Law Act constitutes the major social reform of the 1970's, and that, in bringing to the forefront the principle of non-fault in the grounds for divorce, the creation of the new type of court, known as the Family Court, and the greater emphasis on ancillary services, including counselling and welfare work, the new Act successfully achieves very important social advances.

The Report, after examining a great deal of evidence, basically supports the proposition that the new family law system has been successful. There are, however, a number of improvements which are required after the 4 years experience of the Act in operation.

I now express dissent on certain conclusions and recommendations in the Report, as outlined hereunder.

1. Divorce Grounds

CHAPTER 3—Chapter 3 of the Report does analyse the no-fault scheme of the legislation, and recommends no change in the present ground for divorce. The vindication for the Australian system of family law has been well summarised, in the words of the Hon. Mr. Justice E. Butler, delivered at a seminar in May 1979, when he said:

> "Very few people involved in the jurisdiction would challenge this statement to which I adhere strongly, that the Family Law Act in Australia is a unique piece of legislation gathering into the law for the first time, as no other Act has ever done before, not only principles of law but in the adaptation and use of those principles of law, reference to matters of social conscience, social justice, social welfare, all aspects of learning in sociological, psychoanalytical, behavioural and similarly associated sciences."

However, it may be doubted whether the Court has achieved its full optimum as a conciliation court. To some degree there are remnants in the style and practices of the court as if it were operating as a "supreme court", aloof from the real contest.

Support for the basic system created by the Family Law Act 1975 flows strongly from the evidence and argument summarised in Chapter 3. However, I expressly reject the "open mind" (or "wait and see") approach referred to in Paras. 3.28 & 3.51 and adopted by some members of the Committee in considering the ground of divorce. The evidence available when the Family Law Act was passed in 1974-75, and subsequent experience, has fully justified the adoption of the present ground of irretrievable breakdown.

In Paragraph 3.28 there is reference to the conviction of some members of the Committee that "the changes made to the law in 1975 were detrimental to the institution of marriage and to the stability of the family" and reliance is placed by them on assertions by Cardinal Sir James Freeman (there quoted) in support of that view. Again I reject such assertions and conclude that the preponderance of expert evidence before the Committee shows no justification for such fears. There seems to me no sound reason for suggesting that there has been "a basic change" to all marriages since 1975 or that persons are entering into marriage with the idea that it is terminable at will. Knowledgeable observers have shown that parties continue to enter into marriage with high expectations of success and the present trend towards a later age for marriage reduces the chances of hasty marriage. Marriage as an institution remains a highly popular one and remarriage after divorce is the rule rather than the exception. Consequently this argument about a "basic change" in marriage, which is but a repetition of the 1974–75 campaign, has no real grounds for acceptance.

Critics of the 1975 reforms of family law are to be found in newspaper correspondents and some 200 or more individuals who made personal submissions to the Committee, often criticising their marriage partners, the judge, or lawyers involved in the case. Mistakes and injustices will inevitably have occurred. Members of the Committee were, however, unable to investigate such cases individually, for to do so would involve interviewing all other parties to see whether the complaints, however genuinely felt were justified. Yet the real significance of these individual complaints is found in the small percentage of cases they represent. Since the commencement of the Family Court in January 1976, over 200,000 divorces have been heard and many hundreds of thousands have had close dealings with the Court. The complaint of less than one in a thousand persons is some indication of the immense and conscientious service rendered by Judges and staff of the court in that period. It speaks also for the essential soundness of the Family Law Act 1975.

2. Defects in the Operation of the Family Court

I want to emphasise the main defects in family law operations that the evidence would seem to disclose, particularly that evidence received from major organisations, judges and other specialists closely associated with the working of the Act. They are as follows:

(a) *Divided Jurisdiction*

The division of jurisdiction between State and Federal courts, both in connection with custody and property, and which arises from the regrettable decision of the High Court in *Russell* v. *Russell* 1976, continues to be with us. The Committee's Report stresses the urgency of restoring the united jurisdiction. There appears to be a lack of urgency on the part of all governments in curing this defect by the most desirable means, namely a reference of power from the States to the Federal Government, so that the various missing aspects of the jurisdiction can be brought together in the one court. Paragraph 2.34 sets out an alternative of "dual

commissions" for Family Court Judges exercising both Federal and State laws. A variation of this, described in Paragraph 2.35, is a "dual court" scheme proposed to the Committee by Professor P. H. Lane. I do not believe that either of these versions constitute a workable or effective alternative to the reference of powers by the States. I believe that reference of powers by the States will provide the quickest and most substantial solution to this very real difficulty.

(b) *Unit operation*

Both by reason of the High Court's decisions in a number of cases, and the predilection of some Family Court Judges, there has been an inadequate development of the unit type of operation whereby judges, counsellors, welfare workers, lawyers and others will work together to create the best possible settlement of matrimonial disputes. This was strongly recommended by the Senate Standing Committee on Constitutional and Legal Affairs in its 1974 Report but, unfortunately, this principle of "unit operation" has been in part the victim of judicial conservatism, and the unwillingness of the legal profession to come to terms with a new type of advocacy. Inadequate provision of ancillary staff has contributed to the problem.

Once again, the words of Mr. Justice E. Butler, on page 505 of the speech to which I referred, are relevant both in relation to the approaches adopted by judges as well as other lawyers:

> "However, if the attitude is adopted that lawyers have no need of sociological approaches, but simply need to know the law and to adopt a forensic stance which is no different from that in other courts, then we have made no progress—the legal profession spells the beginning of its own end in the family law jurisdiction."

I believe the quite excessive cost of litigation in the family courts is in part due to a failure to employ and to make the best use of counselling facilities and conciliation opportunities at an early stage in a matrimonial dispute. This ought to be a matter of major priority for government and other authorities.

(c) *Delay in appointments*

A significant factor in the history of the Family Court has been the effect of delays in appointments, both of judges and of ancillary staff, and the consequent backlog of work which has arisen. Chapters 1 and 7 of the Report fail to give adequate emphasis to this important factor. The development of delays (of up to two or three years in some Registries) in the handling of defended applications, has generally meant a great deal of bitterness and animosity has been engendered, and suspicion has been created in the minds of litigants as to the effectiveness of the court and of judges. Delays in the appointment of judges and staff in the early stages of the Family Court's operation, and the consequential delay in defended matters, often leads to a number of additional court appearances, which again increases the amount of court time taken up by such matters. Although this is a matter of past record, it is clear that it will be some time before this backlog is overtaken. This has been one of the prime reasons for the limited effectiveness of the Family Court in its early years.

This factor has been recognised by the Family Law Council which, in its Annual Reports, has considered the delays experienced by some parties in having their cases brought on for hearing. In its Third Annual Report (1979) the Council said:

> "Basically, the problem is one of resources. To improve the situation there need to be more Counsellors and Deputy Registrars to deal with pre-trial conciliation and conference work, in order to reduce to a minimum the number of cases requiring a contested hearing. There may also be a need to increase the number of Judges to help clear the accumulated backlog of cases."

I strongly support these conclusions.

3. Appointment of Judges and Staff

CHAPTER 7—Paragraph 7.54 of the Report indicates that the Committee prefers to see an excessive workload overcome by the appointment of staff rather than by appointment of further judges. I would agree that, at the present time, the appointment of further judges is of lesser priority, although there may be some areas where further appointments are called for. It is true that the appointment of registrars and counsellors is much less costly, and might be more effective in leading to early resolution of disputes. However, I would dissent from the Committee's conclusion, which is to express a clear preference for one over the other, without viewing the specific needs in specific places. In particular, if the specialist Family Court is to expand effectively into areas now served by Magistrates, then further appointments of judges will be required.

4. Magistrates Courts

CHAPTER 8—The Report refers, in paragraph 8.16, to the recommendations of the Family Law Council contained in its Third Annual Report, where it proceeds, in some detail, to deal with the jurisdiction now exercised by Courts of Summary Jurisdiction. The Family Law Council strongly favours the concentration of jurisdiction in the Family Court, and has recommended that the Act be amended to enable the jurisdiction of magistrates courts to be terminated in regard to specified classes of proceedings. In its specific recommendations it proposes that the Family Court should have exclusive jurisdiction, under the Family Law Act, in those metropolitan areas where the Court is permanently established, other than in matters of discharge, variation, suspension or enforcement of maintenance orders or registered maintenance agreements. It also recommends termination of the jurisdiction of magistrates to approve deeds under Section 87 of the Act. The Council has also proposed restrictions on ex parte orders and the injunctive power now exercised by such courts under Section 114 of the Act.

Both the Family Law Advisory Committee of the Law Council of Australia and the Family Law Judges' Law Reform Committee support the general view that the need for uniformity and specialisation requires all matters under the Family Law Act to be dealt with exclusively by the Family Court.

I support the recommendations of the Family Law Council, and regret that the Committee's Report does not give them positive endorsement. The majority of the Committee apparently sees value in a continuance of the jurisdiction of the Magistrates Courts, despite the fact that, in some States, magistrates are not yet fully legally trained nor do they necessarily possess the "training, experience and personality" (required by the Act) to handle family law matters. Furthermore, such state courts lack many of the ancillary services available to the Family Court. The provision of ancillary services to each local court would be unduly costly, nor would it be adequate in itself. Magistrates Courts deal with a myriad of different matters, including criminal, traffic and civil complaints, and the atmosphere and procedures of the courts are quite unsuited to the requirements of family law proceedings. It is clear also that there is a lack of statistics of operations in Magistrates Courts and this will inhibit the

work of the Institute of Family Studies and other researchers. Apart from those who would accept short term solutions (for example, to overcome delay in the Family Court), the bulk of the evidence from those deeply involved in family law practice points to the acceptance of the Family Law Council's recommendations for phasing out of the Magistrates Court jurisdiction as soon as possible.

The majority of the Committee in their recommendations, would continue and consolidate the present jurisdiction of Summary Courts under the Family Law Act. Indeed, the recommendation that the Commonwealth appoint "specifically named" Stipendiary Magistrates in the family law jurisdiction is, I believe, undesirable and should be opposed. I specifically support the first policy alternative, described in Paragraph 8.30(a) of the Committee's Report, providing for the gradual phasing out of the Magistrates' jurisdiction in accordance with the original intention of the legislation.

The Family Law Act did contemplate the appointment of Senior Judges, and other Judges, but regrettably this distinction has not been maintained in the appointments. If the Family Court's jurisdiction is fully extended, over a period, to the whole family law jurisdiction, then the distinction between Senior Judges and other Judges could well be maintained, with the more complex matters (and appeal cases) being handled by Senior Judges.

As to the second policy alternative (Paragraph 8.30 (b)), the conferring of jurisdiction on "designated courts of summary jurisdiction" (preferred by the Committee in Paragraph 8.39 of the Report) attention is drawn to Section 77(3) of the Constitution, which allows the vesting of State Courts with jurisdiction and Section 39(2) (d) of the Judiciary Act which has also been employed for the appointment of special Federal Magistrates Courts. The proposal, supported by a majority of the Committee, is something less than the creation of further State Family Courts (on the Western Australian model). The creation of new State Family Courts at this late stage, poses real problems. It is, I believe, now undesirable to extend this power of extending State jurisdiction in the family law jurisdiction (whether of Judges or Magistrates) and thereby further fragment the family law jurisdiction.

This creation of a mish-mash of Federal and State family court judges and magistrates in States other than Western Australia (which is contemplated by the Committee in Paragraphs 8.39 and 10.97-10.99) would require elaborate co-ordination between State and Federal authorities. The Committee acknowledges this by requiring the establishment of State "Domestic Relations Commissions" and a co-ordinating Commonwealth "agency". Rather than create this extra costly bureaucratic machinery, the funds could be better spent in the extension of present Family Court facilities to other parts of the Commonwealth.

Apart from the undesirable effects of perpetuating the State magistrate jurisdiction and frustrating the original objective of a comprehensive specialist family court (contemplated at the time of passage of the Family Law Act), is the additional fact that strong doubts now arise as to whether the recommendation in Paragraph 8.39 has constitutional validity. The Committee indeed acknowledges (Paragraph 8.38) and it has been so advised that it is "an open question" whether the Commmonwealth could invoke the Judiciary Act provisions to specify particular magistrates or magistrates with particular attributes to exercise the jurisdiction in mind.

For all these reasons, I specifically dissent from the proposals in Paragraphs 8.2, 8.30(b), (c), 8.35, 8.39 and 8.40 for mixed administration of family law by Federal and State Judges, magistrates and staff and the extended use of Stipendiary Magistrates proposed in Paragraphs 8.35 and 8.39 of the Committee's Report.

5. Legal Aid

CHAPTER 11—Chapter 11 makes reference to the situation of legal aid in Australia. The availability of legal aid is of extreme importance in this jurisdiction, with something close to 80% of legal aid moneys being spent on family law matters. The Committee's findings on this subject are not a matter of dissent but, in my opinion, inadequate recognition has been given, in the Report, to the significant lack of legal aid provided by the Commonwealth. There is good reason to fear that this inadequacy will be continued by the new State Commissions.

After an analysis of the evidence available to the Committee as to the limited availability of legal aid through the Australian Legal Aid Office (A.L.A.O.). Kerry A. Peterson, LLM* reached this conclusion:

> "On these figures the A.L.A.O. aid is seen to reach only the poorest 10 per cent of the population. It might be thought that all of that group were suffering hardship, but they must all pay a contribution towards costs unless they can show that they suffer real financial hardship."

The limitation of legal aid basically to those below the poverty line, and the requirement imposed on litigants to pay fees and contributions have all led to a defeat of expectations about the ready availability of family law services.

Because of the limited guidelines, legal aid is largely confined to pensioners, but the real problem is that other persons of small means are thereby deprived of the opportunity of pursuing their rights. Alternatively, they are, in many cases, forced into disadvantageous settlements because of the lack of availability of legal aid. Legal aid given to one party, and unsupervised, may often lead to the bankruptcy of an unaided party. These problems have not been examined in detail by the Committee, but I believe legal aid inadequacies should be regarded as a key defect limiting the effective operation of the family law system.

* Cost Sharing Under the Family Law Act, article by Kerry A. Peterson, LLM (Australian Law Journal Vol. 54, May 1980)

6. Settlement of Ancillary Matters

CHAPTER 11—I dissent also in respect to the statement (Paragraph 11.34 of the Report) in which the Committee recommends the "settlement of ancillary matters, that is custody, access, injunctions and property settlement matters be encouraged as far as possible. Parties should be encouraged to bargain. By this means not only will legal aid funds be saved but also the burden on the courts will be reduced". In my opinion, this should at least state that there should only be encouragement of such settlements "on reasonable terms". The law should not be such that persons are forced into settlements of their rights by reason of the lack of legal aid, or their ability to pursue their remedies, and this does not become evident from the Committee's recommendation. It should not depend upon the opinion of the Australian Legal Aid Office, or a State Legal Aid Commission, as to whether legal action should be pursued. It is not sufficient merely to allow an appeal against a decision not to grant legal aid, because this may be, in practice, an inadequate remedy. It should not be so that the body with the power to grant or refuse legal aid, can determine, without outside legal advice, whether or not a person should be allowed to proceed to enforce his or her legal rights.

7. The Court's Discretion on Costs

CHAPTER 11—In Chapter 11 of the Report (at Paragraph 11.39) the Committee recommends that there should be a wider judicial discretion to deal with costs in proceedings under the Act. I dissent from this recommendation. The costs provisions in Section 117 of the Act were carefully weighed at the time the Family Law Bill was passed in 1974–75. Generally, each party is to pay his or her own costs but courts can make orders for costs where there are circumstances "in a particular case" that justify the courts in ordering costs. I do not believe that there should be some new and wider discretion exercised to grant costs to be paid by a party just because the other party is more impecunious. I believe the present right of the court to make an award of costs "in a particular case" is adequate, and it is undesirable that the former system, whereby orders for costs were generally made against husbands as a matter of course, should be allowed to be reinstituted.

Furthermore, the fact that one party has not received legal aid, is no reason why the other party should be under any greater risk that an order for costs might be made against him. This being so, I specifically reject the Committee's statement in Paragraph 11.37, namely,

> "Further, in all cases where one party has reasonable resources and the other has not and is not eligible for legal aid, there may also be a case for considering an order for costs".

Why should heavy orders for costs be inflicted because of a decision of the legal aid authorities over which the other party has no control nor any right to object?

For these reasons I dissent from the recommendation in Paragraph 11.39 of the Report.

8. Open/Closed Courts and Publication of Proceedings

CHAPTER 9—These issues and the contrasting arguments have been discussed at length in Chapter 9 of the Report and the majority of the Committee is in favour of amendments to the Family Law Act permitting open court hearings and permitting some restricted press publication of proceedings. (Paragraphs 9.08 and 9.18)

I dissent from these recommendations.

When the Senate Standing Committee on Constitutional and Legal Affairs, in 1974, supported the closed courts proposal and the proposed restrictions on publication, it did so on the basis of strong objections (that had been presented by witnesses) to open courts and publicity. Allegations were made that the humiliation to, and discomforture of, litigants and witnesses in proceedings of such a personal nature (even under the restrictions imposed on publicity by the Matrimonial Causes Act 1959–61) had been a significant defect in previous family law legislation. The right to attend court proceedings is perhaps the minor aspect of the problem providing some embarrassment to litigants. However, publication of salacious details with inevitable embarrassment to children, relatives and friends, is the more serious complaint.

The complaints before 1961 were about metropolitan and local sections of the Press which found it very profitable to batten on the misery of litigants in divorce courts.

Moreover, the problem arose also in access to, and reporting of, Magistrates Courts proceedings and, after the 1959 Act, the publicity for litigants in such maintenance and custody proceedings in Magistrates Courts continued unabated. The misuse of these facilities for publicity by "Truth" and some other newspapers continued until the Family Law Act prohibitions and one can expect every effort to be made to reopen this public sore.

The Western Australian Attorney-General, an advocate of open courts and publicity for proceedings, acknowledges that in previous days there was some "muckraking coverage of divorce cases" and is quoted (at Paragraph 9.11 of the Report) as saying:

> "Since then there has been an improvement in standards of public taste, and it is felt that if the Court is open to the media as well as the public, there should be no irresponsible prying into other people's affairs".

Certainly, there should be no such prying, but I am unaware of any evidence of improved "public taste" throughout the country, or any reason for such optimism.

Some witnesses before the Committee believe that publicity for proceedings will improve judges' performances, prevent unjust actions and lead to better understanding of the Court's role by the public. I see little prospect of a positive educative role. I see little evidence to support these reasons and believe judges' decisions are more likely to be affected by possible reversal in the Appeals Court. I have little confidence in the ability (or interest) of the media to report serious arguments on points of law, and I anticipate rather a concentration on the "sensational" evidence and flamboyant exchanges between participants. The destruction of privacy this involves is not likely to be offset by a burst of public enlightenment on family law.

The Report (Paragraph 9.14) makes reference to reports on restrictions on access to Courts and publication in Great Britain and Canada. The Report of the Canadian Law Reform Commission has recommendations for guidelines on this subject. The recommendations are as follows:

> "Proceedings in a unified Family Court should be closed to the public subject to a discretion in the court to admit persons with a bona fide public or private interest.
>
> Members of the press and other news media should be permitted to attend and report upon such proceedings but their reports should not include any particulars that could lead to identification of the parties.
>
> Steps should be taken to ensure the publication of judicial decisions in professional journals. Despite some progress in recent years, there is a widespread ignorance of judicial decisions within the concerned professions".

It is worth recalling that while the Family Law Act (Section 97) in general provides that the proceedings shall be heard in closed courts, the court may (under the regulations) permit any person to be present. Furthermore, Section 97(2) provides:

> "(2) Subject to the regulations, relatives or friends of either party, marriage counsellors, welfare officers and legal practitioners may be present in court unless in a particular case the court otherwise orders".

Appeal proceedings and proceedings for contempt or breach of an injunction or order (where the liberty of the subject may be involved) are also held in open court under the terms of the regulations.

The restrictions on attendance at court therefore are far from total. I would in no way object to Section 97 being amended to specify the right of the court to permit the attendance of any "persons with a bona fide public or private interest", in the terms of the Canadian Law Reform Commission's Report. In particular, this would entitle Welfare Departments to observe proceedings as contemplated by the Committee at Paragraph 5.26 of the Report. The limited opening of courts to persons with "a bona fide public or private interest" would mean that the dependence on a judge's discretion (which is at present unqualified) would be reduced and the class of persons entitled to attend would be given some logical basis.

The majority of the Committee places some reliance (Paragraph 9.04) on the recommendation of the Family Law Council in favour of open courts, but it must be noted that the original recommendation excepted hearings "when the court is

exercising jurisdiction with respect to the custody, guardianship or access to a child of a marriage". The Committee majority has ignored this important exception in its recommendation in Paragraph 9.08.

However, I believe the Committee's recommendation on publication to be a dangerous one. I do not believe that evasion of the proposed restrictions on reporting (so as to prevent identification of any person) will be beyond the ingenuity of the media. Many pending proceedings are known in advance and despite the anonymity, salacious material will be identified in the public mind and the person involved will be known without any direct statement by the media.

If the restrictions requiring anonymity proposed by the Committee are nonetheless effective, then I have no doubt the media will not be interested in publishing the material, and nothing is gained by changing the law. If the restrictions prove to be ineffective, then we will return not merely to the pre-1975 position, but to the pre-1961 position when few restrictions on publication prevailed.

I see no need for nor any good purpose to be served in taking this risk and accordingly I dissent strongly from this recommendation.

ALAN MISSEN
Senator for Victoria

DISSENTING REPORT BY MR A. C. HOLDING

I wish to add my support to the Dissent of Senator Missen.

Clyde Holding

DISSENTING REPORT BY SENATOR COLEMAN, DR N. BLEWETT AND SENATOR MELZER

The following represents our Dissenting Report on that section of the Report headed 'Maintenance Provisions under the Family Law Act'. We dissent from Recommendation Number 5.45 of the Report which deals with maintenance provisions of the Family Law Act and the requirement that the court take into consideration the conduct of the applicant for maintenance towards the respondent and relevant to the matrimonial relationship. We find this Recommendation out of keeping with the intention of the Family Law Act to exclude considerations of the conduct relevant to the matrimonial relationship from the purview of the courts. We recognise some of the difficulties occasioned by s.75(2)(o) and the persuasiveness of some particular cases. Nevertheless it is our view that hard cases make bad law. We think that to respond to some of these cases by reintroducing considerations of conduct as a means of reducing maintenance opens the flood gates. It would provide an occasion on any range of cases for a party to do what used to be done under the old legislation, that is dredge up all the dirt that can be found and to put it in as lurid terms as possible. We believe that whatever the difficulties of the few really extraordinary cases, to respond by

introducing considerations of marital conduct into maintenance decisions would be to open a can of worms as a matter of everyday practice in the defended list. We believe the evidence received by the Committee has overwhelmingly supported the view that the extent to which the conduct of either of the parties to a divorce brought about the breakdown of the marriage is not a matter on which a court can properly rule. The majority of the Committee believes that there is no evidence to support a contention that there should be grounds for divorce other than irretrievable breakdown. We therefore find it inconsistent for a court to be able to review the conduct of a party when establishing the level of maintenance other than by the power already allowed in the Act under s.75(2)(o). If there has been or there exists conduct so gross as to warrant special consideration then we believe that s.75(2)(o) allows the court to consider such matters relevant. We therefore recommend that s.75(2)(o) stand.

Senator Ruth Coleman, Dr Neal Blewett, Senator Jean Melzer:

I wish to add my support to part of the Dissent of Senator Missen. I support sections 1, 2, 4, 5 & 6 but do not support sections 3, 7, 8 & 8.

Dr Neal Blewett

I wish to add my support to the Dissent of Senator Missen. I do not support the recommendations contained in chapter 9 and 11 of the Committee's Report.

Senator Jean Melzer

I wish to add my support to part of the Dissent of Senator Missen. I support sections 1-7 of this Dissent and the views expressed in section 8. I dissent from recommendation 60 of the Committee's Report and the recommendations contained in chapter 11 of the Committee's Report.

Senator Ruth Coleman

DISSENTING REPORT BY SENATOR WALTERS

Simplified Procedure in Undefended Dissolution Applications

I dissent from recommendation No. 50 of the Report which deals with the above subject and is commonly referred to as "Divorce by Post".

The Committee Report states that, quote: "the real issue is one of costs, both to the State and to the parties involved". This is the fundamental issue with which I disagree. The Report concludes that measures must be introduced which will save expense. Accordingly it recommends that Australia adopt a system similar to the one operating in the United Kingdom in which divorce petitions and decrees can be transacted by the lodging of documents only; the parties to the divorce not being required to appear.

I submit that this procedure devalues marriage. As marriage is an institution central to the continuation of our society, we must ensure that this legislation, while providing the mechanism for divorce, does not destroy the basic structure. When marriage takes place, both parties are required not only to appear themselves before the marriage celebrant, but also to supply witnesses to the ceremony, thus making a public commitment as well as a personal one. The real issue on this occasion is not the financial cost of a marriage ceremony; the real issue is the formal pronouncement of a new responsibility, indeed a legal contract, being undertaken which is social as well as personal. Similarly with the subsequent breaking of this contract, the real issue is not

financial cost, as stated by the committee, the real issue is the seriousness of the social cost to the person, the family and the community and it is on these grounds that I base my objection to Postal Divorce.

Firstly, I believe there is no doubt that the law of the land influences individual and community values and it would therefore be irresponsible of the Parliament to set an example through legislation which failed to endorse a commitment to stable marriage. If all that is required to end a marriage is to fill in forms and post them off, then the concept of long-term commitment to a shared partnership is weakened from the beginning.

Secondly, by not requiring the parties to appear in the court environment, we would relinquish a part of the valuable support network available to them, which is such an essential component at the dissolution of marriage. Evidence was given to the committee by Dr. Russell Pargiter, a Senior Consultant Psychiatrist, on the necessity for a ceremonial "end point" at divorce, comparable to a funeral service, to aid in a healthy recovery from emotional loss.

Accordingly, my recommendation is that appearance in court of both parties to divorce be mandatory, and that substitute representation by counsel be disallowed, but that the court's discretion be used in cases where personal appearance is neither practical nor possible.

Shirley Walters

DISSENTING REPORT BY THE HON. K. M. CAIRNS AND THE HON. R. C. KATTER

We propose four recommendations substantially different from the majority Report of the Committee—

(1) That as some States have made it clear they will not recommend the reference of powers concerning children to the Commonwealth, and as the West Australian Family Court, invested with Federal jurisdiction, has functioned, and been acknowledged to have functioned most satisfactorily, the Commonwealth renew and review its offer to those States, e.g. Queensland, who have explicitly refused the reference of powers, and offer appropriate financial and legal assistance to invest a State Family Court with Federal jurisdiction on the West Australian model.

(2) Alternative to Recommendation (6) of the majority of the Committee, we recommend that as there is an implied contract in the marriage ceremony, a free option alternative be offered. That the marriage will be dissolved on finding it to have irretrievably broken down for just cause. Just cause to be determined as wilful conduct whereby one of the parties is judged to have broken the partnership or consortium of the marriage. This could include, also, events taking place beyond the control of either spouse which makes the marriage relationship intolerable to either party.

(3) We recommend that those undertaking marriage be encouraged to undertake a specific contract involving the partners in a maintenance and property regime to be implemented on any dissolution of the marriage. Every effort be made to ensure that this regime be upheld by the Court excepting when it is unjust, unfair, or undertaken in circumstances which are no longer relevant through the effluxion of time.

(4) We agree with Senator Walters that in cases of dissolution both parties to the divorce be required to attend, that substitute of representation by Counsel be disallowed, and that the Court's discretion be used in cases where personal appearance is neither practical nor possible.
Marriage deserves more than to be dissolved merely through the mailing of documents.

The present Family Law Act was claimed by its proponents to be "in advance of its time". Judgment has to be made as to whether the social values promulgated through the Act have benefited Australians. The Act of 1975 was, however, promulgated without fundamental social analysis. Its basic principles therefore cannot be regarded as immutable.

Section 43 of the Act states that marriage is "the relation which exists between a man and a woman to the exclusion of all others which is voluntarily and publicly entered into and which is intended to last for their joint lives, to afford them mutual help, comfort and support, and to protect and promote the welfare of the children of them and each of them". Subsequent sub-sections of Section 43 follow.

Section 43 is 'non-operational'. In other words it is propaganda. Only in 1979 and 1980 have its non-operational or propaganda effects been acknowledged. Those people in the community who at least believed in the intention of Section 43 have had their intentions put aside. Those who view marriage through this provision of the Act are forced into a minimum position concerning their implied contract with a marriage partner. Hence we propose an alternative option of marriage contract.

An analysis of the state of marriage in Australia should be made before fundamental recommendations are made.

In Chapter 3, "The Dissolution and Nullity of Marriage", paragraph 3.27, the majority of the Committee states that its proposals will "strengthen marriage by encouraging parties entering into it with a more detailed knowledge of its consequences". It never argues that stability of marriage is endangered, it is never agreed for certain as to its position.

In Chapter 3—conclusions—the majority of the Committee also states "It is not possible to predict the likely future trend of the Australian divorce rate because of factors that have recently emerged, the full significance of which it is too early to assess". This was preceded by the statement "In Australia the long term trend of divorce is moving in an upwards direction. This trend preceded the introduction of the Family Law Act".

Contradictory statements are quoted with equal authority.

Repeated evidence asserted that 'the Law had no effect on behaviour', hence the conditions for the dissolution of marriage had no effect on attitudes. This point was argued by representatives of the legal profession, and is an important prerequisite for majority Committee Recommendation 6 which affirms the present provisions of the Act for dissolution.

Yet in Paragraph 3.27, the Committee aserts that its proposals "will strengthen marriage by encouraging parties entering into it with a more detailed knowledge of its consequences". In other words, a knowledge of the Law in some areas will influence behaviour, but dissolution is excluded.

The Committee was advised that marital dissolution, or divorce, is no evidence of changes in the rate of marriage break-down. The logic is overwhelming, like asserting that high mortality rates in a society are unrelated to health experience.

There is now nearly a 40% chance that if a young girl enters marriage with the desire to have children, one spouse, most likely the mother, will end up having to raise the children in a one-parent or another family. Arguments that the higher marriage break-down today is related to the higher marriage rates of 7 to 10 years previously suggest that this analysis is too stark. Even this reasoning is confuted by the fact that the rate of divorce per thousand marriages 5, 6 and 7 years previously has increased, as is shown in the following table—

Divorce Rates—1965 to 1979

Year	*Divorce Rate per 1,000 Marriages of 5 to 7 Years Previous*
1965	114.4
1970	141.1
1971	141.5
1972	162.7
1973	161.4
1974	167.0
1975	217.8
1976	548.3
1977	389.7
1979	338.1

In the past people were expected to marry although often not really suited to it, hence when divorce became easier there was an increased liability to divorce. Now with the so-called pressure to marry significantly lessened, the marriage rate has decreased. More people are living together in other arrangements. Yet the dissolution rate at its most conservative is, at least, one-third of the marriage rate in any one year.

The rate of divorce per thousand marriages in the same year has averaged a little under 400 over the last 4 years. Hence a potential parent undertaking marriage solemnly and aware of these trends must be concerned. The essential expectation of its being a life-long or even long-term partnership is being eroded. People are making this free choice of their own will. They assert that right which is their prerogative. Therefore, no criticism whatsoever is warranted for those people availing themselves of the present provisions of the Family Law Act.

However, many expect stability in marriage and the Law should afford that support to those who desire it. Hence the alternative free option proposed in Recommendation (2) which affirms it as being an effective contract.

Estimated Divorce Rates for First Marrieds 1965 to 1976

Year	*Divorces of First Marriages per 1,000 First Marriages*
1965	88.8
1970	104.4
1971	109.4
1972	138.3
1973	146.1
1974	163.3
1975	243.8
1976	647.6
1977	495.4
1978	451.7

ASSUMPTIONS:

(a) Divorces of first marriage equals the number of divorces less the average of husbands and wives with divorced marital status at the time of marriage.

(b) First marriages equals the number of marriages less the number of bridegrooms and brides with divorced marital status at the time of marriage.

Therefore, attitudes towards marriage are changing whether it be concerning first or ever marrieds. It is much less stable. This must be acknowledged and not ignored. It is absurd to say, as have members of the Family Law Court and sociologists that "marriage is as popular as ever" because on this basis marrying Tommy Manville and Henry VIII must have been among its greatest proponents.

For the community these social changes must be accommodated.

To deal with this changed relationship the Family Law Court has expanded from nil to 40 judges in 4 years. It is now the largest single division of the judiciary. No stagnation in its rate of growth!!

This has effects on public expenditure, e.g. the rate of increase of payments to single parents and deserted wives is the largest rate of increase of any cumulative payment by the Commonwealth (25% per year). In a corporate sense Australia is losing the benefit of its most efficient and economic social unit. Public expenditure cannot compensate for the loss of stability in the family. The justice of each case has to be considered together with its community effects.

These facts have not received the attention they deserve in the Committee's Report.

An alternative free option as in our Recommendation (2) offers a legitimate choice which is tenable in law and social practice.

Free Option

(1) provides a choice where none exists;

(2) offers an opportunity to those intending marriage for other than minimum conditions for dissolution;

(3) introduces the idea of a contract where presently there is an implied contract; and

(4) lessens the sense of deep injustice which for many innocent parties pervades the present arrangements.

It also offers forewarning where one partner enters into marriage with at least long-term expectations and the other does not, or looks at it as a short-term experience. This could become evident at the time of marriage when the choice of option becomes available. Happiness for at least one partner could be considerably enhanced because he or she might be forewarned when the choice has been made.

If it be argued that the free option will involve considerations of behaviour or fault, it should be remembered that the Committee is already recommending that behaviour or fault be considered in matters of maintenance, custody, and in the determination of costs. The choice of the alternative option must be made freely.

At present, and on the Committee's recommendations, conduct is considered essential to the distribution of money, property, and concerning custody, but never to marriage itself. Only a poor childless marriage is at present completely immune from considerations of behaviour.

We believe it was necessary to made a judgment concerning marriage and the family in Australia. The Committee was asked to report on the provisions and on the operation of the Family Law Act 1975 with regard to (ii) "its effects on the institution of marriage and the family". Instead the Committee has relied on an altogether too precise analysis to dismiss it.

The fact is that there is an increasing instability, with anguish, and the Law has a role in responding to it.

The process should not be ignored.

Nowhere is it suggested that if security and stability in marriage are legitimate aims, then they are on the retreat and that fact be heeded in the recommendations. Hence, quite a number of those who might contemplate marriage have clearly responded. 'Why bother getting married if the entry and exit are so easy'. That of course is their own personal choice.

However, these observations have been ignored by holding to the principle that the Law has no influence on personal behaviour. That statement is an easy excuse for observing no responsibility and making no judgment.

Concerning Recommendation (1) the fact is that the evidence affirms the success of the West Australian Court. There have been no Appeals from the West Australian jurisdiction and arguments that there is a possible conflict of interest in Appeals to the Full Court of the Family Court or the West Australian Supreme Court have not arisen. The Committee's objection to recommending the West Australian procedure for States that will not refer powers is based on this possibility and not the fact of its success. In other words the case of uniformity and therefore on compulsion, especially on the outlying States is intended to be supreme. Against this is that on the present division or responsibility Appeals concerning children other than those of the marriage continue to be made in and from States other than West Australia. Hence we recommend (1) that a renewed offer be made to those outlying States who do not intend to refer powers over children other than those of the marriage. The judiciary could assist by accommodating one another at the State and Federal level concerning the status and remuneration of judges. It is unbelievable that a dispute about relative rates of remuneration for State and Federal judiciary be a significant stumbling block.

Recommendation (3) is not compulsory but it should be encouraged and would encourage those people undertaking marriage with the free option to consider the responsibilities of one partner to another. At the very least it would assist in the situation before a universal property regime is developed.

Recommendation (4). In most States people have to present themselves at Government and Public Service departments and Police Offices for licences and other certificates. This often occurs in cases where a renewal is necessary, whether it be for a driver's licence or auctioneer's licence.

Marriage dissolution should at least require a similar concern.

Robert C. Katter

Kevin M. Cairns

DISSENTING REPORT BY MR J. R. MARTYR

Contents

Foreword

I have had a continuing interest in Family Law, having petitioned two Attorneys-General for an inquiry. I became involved because I had so often seen innocence punished harshly by the "no fault" unilateral divorce law conducted in secret of the Family Law Act.

I have read the 600 submissions and papers presented to the Committee, have been with the Committee in almost all of the hearings in every Capital city, and have attended the deliberative meetings and seminars in Canberra and elsewhere. I have read and deliberated over the final draft reports, and I have addressed myself specifically to the Terms of Reference given to the Committee by Parliament.

I am unable to sign the Joint Select Committee's Final Report because of quite fundamental disagreements with the Joint Select Committee about:

(a) The nature of marriage. The Committee is equivocal about the basic permanence of marriage—I am not.

(b) The essence of the present Family Law Act. The Committee accepts "no fault" divorce—I do not.

(c) The relevance of the Jupp analysis to the Terms of Reference. I do not accept the analysis, and reasons are given in this Report.

(d) Procedure followed by the Committee in regard to taking testimony from, and being involved on the Committee with, the judiciary of the Family Court and the Family Law Council.

In regard to point (d) above, I objected to taking testimony from, and being involved on the Joint Select Committee with, the Judiciary of Family Court and the Family Law Council. My objections were raised at, and rejected by, a deliberative meeting of the

Joint Select Committee. However, I hold those objections still, and note that the Committee finally apparently agreed in part: on 7th November, 1979, the Chairman rejected an offer from the Family Law Council to again meet with us and his rejection was supported by a deliberative meeting of the Committee.

My basic objections are, I believe, well founded in the concept of liberty well expressed by Montesquieu. He says, "In every government there are three sorts of power: the legislative; the executive in respect of things dependent on the law of nations; and the executive in regard to matters that depend on the civil law (the latter we shall call the judiciary power) . . . There is no liberty if the judiciary power be not separated from the legislative and executive. Were it joined with the legislative, the life and liberty of the subject would be exposed to arbitrary control, for the judge would then be the legislator.

The Joint Select Committee Chairman himself had much the same thing to say in a speech reported in House of Representatives Hansard p. 2917, 13th November, 1979, in the debate on the High Court of Australia Bill. He said, "Liberty has long been dependent on the independence of the functions that each of the areas of government have in our system and their effective separation."

Also on Thursday 10th April, 1980, at a deliberative meeting of the Joint Select Committee, Mr Holding M.P. and Senator Missen and others upheld this principle when they disagreed with the suggestion that the Joint Select Committee should recommend a pool of judges from which appellate judges can be drawn to constitute Full Benches, on the ground that this prerogative must remain with the Chief Judge as head of the Family Law judiciary, and the Parliament must not interfere.

I believe in the validity of this principle of separation, and regretfully express the view that this Joint Committee should not have heard the Family Law Council and the Family Law Court judges (I exclude from this Judge Nygh, appointed to the Bench after his submission to our inquiry and who appeared as an individual.) I mention here an instance where Mr Justice Barblett, Chief Judge of the W.A. Division of the Family Court, at one hearing in Perth at which I was present actually directed a member of his staff giving evidence NOT TO ANSWER a question I asked, and the question was not answered.

In my view the appearances of the judges constituted a breakdown of the proper traditional separation of judiciary and Parliament, and may have damaged the over-riding integrity of the Parliamentary role, which must never be seen even remotely as being pressured by the judiciary.

The Committee may have been able to learn from the wisdom and experience the Judges may have built up since the Act began operating, but it would, I believe, have been wiser to have obtained it in other ways than by their direct appearances before the Select Committee (for instance from Court staffs).

Turning to the inquiry in general, because of its nature much of the material submitted and heard concerned matters of opinion. This is not to derogate from its substance and credibility, merely to place it in proper context, although I do draw attention to submissions from two womens' groups in different capital cities which were identical word for word—a fact which did not enhance their credibility or reflect common sense and respect for this Committee's intelligence and perception.

The vast majority of the witnesses and submissions were concerned with the unhappy side of marriage—its breakdown and unhappiness. Except indirectly in their appearances on other aspects, very few came specifically to tell us of the joys and growth and maturity of traditional marriage and family. Although this was an unfortunate disbalance, it was unavoidable as the Inquiry was about an Act which has

no concern for happily married people because it is essentially about the breaking-up of marriages: one reason, incidentally, that I regard its name—the Family Law Act—as somewhat anomalous.

Membership and Terms of Reference of the Join Select Committee on the Family Law Act

The appointment of the Committee was announced on 28 September 1978.

Members

Mr P. M. Ruddock (Chairman)	DUNDAS, N.S.W.
Senator R. N. Coleman (Deputy Chairman)	WESTERN AUSTRALIA
Mr L. F. Bowen	KINGSFORD-SMITH, N.S.W.
Dr N. Blewett (from 10 May, 1979)	BONYTHON, S.A.
Mr J. J. Brown	PARRAMATTA, N.S.W.
Mr K. M. L. Cairns	LILLEY, QUEENSLAND
Senator G. S. Davidson	SOUTH AUSTRALIA
Mr P. D. Falconer	CASEY, VICTORIA
Mr A. C. Holding	MELBOURNE PORTS, VICTORIA
Mr R. C. Katter	KENNEDY, QUEENSLAND
Mr S. A. Lusher	HUME N.S.W.
Mr J. R. Martyr	SWAN, WESTERN AUSTRALIA
Senator J. I. Melzer	VICTORIA
Senator A. J. Missen	VICTORIA
Mr F. E. Stewart (until April 1979)	GRAYNDLER, N.S.W.
Senator M. S. Walters	TASMANIA

Terms of Reference

That a joint Committee be appointed to inquire into and report on—

(a) the provisions, and the operation of the Family Law Act 1975, with particular regard to—
  (i) the ground of divorce and whether there should be other grounds;
  (ii) its effect on the institution of marriage and the family;
  (iii) maintenance, property and custody proceedings including:
    (a) the bases on which orders may be made in such proceedings; and
    (b) the enforcement of orders in such proceedings;
  (iv) the organisation of the Family Court of Australia and its conduct of proceedings;
  (v) the conduct of proceedings by State and Territory courts exercising jurisdiction under the Act;
  (vi) whether the Family Court should be more open to the public when hearing proceedings, and whether publication of the details of proceedings under the Act should be permitted;
  (vii) the services provided by:
    (a) the counsellors attached to the Family Courts; and
    (b) approved voluntary marriage counselling organisations;
  (viii) the cost of proceedings under the Act; and
(b) any other matters under the Act referred by the Attorney-General.

Co-ordination sheet showing co-ordination of Terms of Reference, Findings, Recommendations and Report

TERM OF REFERENCE (i), (ii), (iii), (iv) and (v):
FINDINGS 1, 2, 3, 4, 5, 6 and 8.
RECOMMENDATIONS 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 12, 13, 16.
REPORT paragraphs 1-52, 57, 58, 65-98; Appendices A, C, and D.

TERM OF REFERENCE (vi):
FINDING 7.
RECOMMENDATION 11.
REPORT paragraphs 60, 64.

TERM OF REFERENCE (vii) (a) and (b):
FINDINGS 9, 12, 13.
RECOMMENDATIONS 14, 15.
REPORT paragraphs 27, 53, 59; Appendix B.

TERM OF REFERENCE (viii):
FINDING 9.
RECOMMENDATION 17.
REPORT paragraphs 23, 35, 36.

Summary of Findings

1. The Family Law Act is a divorce act only, and has contributed substantially to the breakdown of marriage and family as a permanent commitment.
2. The Family Law Act purports to uphold marriage, but in effect makes marriage an unenforceable contract, with 12 months' separation as the only ground for legal 'no fault' unilateral breaking of the contract.
3. The Family Law Act has no priority for annulment applications.
4. The Family Law Act has abolished innocence and therefore its judgments cannot be based on complete justice.
5. The Family Law Act, in abolishing innocence, has caused confusion by allowing sociology, through court counsellors, into what are and should always be essentially matters of law. Sociology is inherently inexact; the law tries to be exact about innocence and guilt—thus the confusion.
6. The Family Law Act allows divorcees to start a new domestic life before ALL matters are settled. This causes more confusion and difficulty, particularly for children.
7. The Family Law Act allows trial and judgment in secret. The law must always be open to the public and its proceedings and findings open for publication, with proper protection for the under age only.
8. The Family Law Act, particularly through "no fault" divorce, has separated Family Law from the mainstream of Australian jurisprudence. There is also a special condition in the Family Law Act for appointment as a Judge of the Family Court, and there are different premises, procedures, rules and customs, which are unnecessary and undesirable.
9. The Family Law Act is enormously expensive to the taxpayer. It has created a heavy structure of judges and extra bureaucracy, with more to come with the Institute of Family Studies. Only rarely has cost of proceedings been excessive. Excessive fee appeals before Registrars, if successful, do not have costs of appeal awarded as in other courts.
10. The Family Law Council is performing work which should be the sole province of the Parliament.
11. The Institute of Family Studies will add nothing to marriage stability and permanence.
12. The Family Court has no machinery for reconciliation counselling. Its "court counsellors" are essentially expediters of court procedures.
13. The Family Law Act's "no fault" divorce has confused marriage counselling organisations to the point where they are vague about their purpose. They feel no real support from the Family Court.

Recommendations

1. The present Family Law Act 1975 as amended should be revised and replaced with legislation in the spirit of the suggested "Model Provisions" and the other proposals in Appendices A, B, C and D attached, which will give effect to the following:
2. The Family Court of Australia should be abolished, and the original jurisdiction should be exercised by a State Court exercising Federal jurisdiction, and a Family Division of the Federal Court should exercise appellate jurisdiction. The purpose is to reverse the undesirable trend created by the Family Law Act, of deliberately separating the Family Court from the mainstream of Australian jurisprudence through "no fault" divorce, special conditions for judicial appointment, and a host of different procedures, rules and practices.
3. The Marriage Act and the Family Law Act should be consolidated, to provide a Family Law Act that will govern the making, subsistence and, if necessary, dissolution of marriage.
4. All celebrants of marriage should be required by law to provide to the parties involved, full and specific information on the permanence, legal requirements and basic undertaking of marriage, and to specify before performing the marriage that they are satisfied the parties entering into the marriage are fully aware of the permanence and nature of the commitments they are undertaking, and that the parties have entered into a marriage contract.
5. The form of words used in marriage ceremonies should be laid down by law, and must be an unequivocal statement of the permanence of marriage.
6. The principle of marriage contracts to be established, to be entered into before marriage, especially with relation to children and disposition of property on dissolution and the rights and obligations of the marriage partners.
7. Provision should be made for annulments for the following causes present at the time of the marriage:
   (a) Either party was not of full age;
   (b) Either party was not of sufficiently sound mind;
   (c) Either party is incapable of or unwilling to consummate the marriage;
   (d) Either party was suffering from communicable venereal disease unknown to the other party;
   (e) The woman was pregnant by another man, unless the groom knew of this;
   (f) Either party was married already;

(g) Either party had been or was actively engaged in homosexual activity or sexual activity with animals at the time of marriage without the knowledge of the other party;
(h) The parties were within prohibited degrees of relationship at the time of marriage;
(i) Mistaken Indentity;
(j) Coercion.

Proceedings for such annulments should be given priority of hearing by the Family Law Court (Family Division of the Federal Court of Australia).

8. The parties to a marriage will sign any one of three alternative contracts:
   (a) marriage terminable by the mutual consent of the parties; or
   (b) marriage terminable on the giving by either party to the other of twenty-four months notice (Apart from the longer period, this is the same form as is presently in use); or
   (c) in the case of a marriage agreed by the parties in the contract of marriage to be determinable for just cause, the marriage will be terminable on the court finding the marriage to have irretrievably broken down for just cause. Just cause shall consist of either of two alternatives:
      (i) wilful conduct which is tantamount to one party breaking the consortium of marriage (e.g., cruelty, habitual drunkenness, etc.); or
      (ii) an event or sequence of events occurring without the fault of either spouse which reasonably renders the consortium intolerable to either party.
9. The period of separation before which dissolution of marriage may be applied for should be increased from one year to two years, and should commence at the date registered on which the parties are no longer living under one roof.
10. All matters connected with each application for dissolution of marriage should be heard at once, before the decree nisi is granted.
11. All hearings of courts concerned with the dissolution of marriage should be public, with names of the parties suppressed from publication only where there are children under 18 years of age directly involved in the action.
12. The Family Law Council should be abolished and replaced by a continuing Committee of the Parliament.
13. The Institute of Family Studies should be abolished. The court (or the Family Division of the Federal Court of Australia) should be empowered to provide essential statistical data about marriage and dissolution of marriage.
14. The title of 'court counsellors' should be changed to 'judicial expediters' or 'judicial assistants'. Calling them 'counsellors' confuses people, who expect them to be engaged in reconciliation counselling.
15. Marriage guidance counsellors should be given greater access by law to separated parties, with a view to reconciliation.
16. Regarding de facto arrangements, whilst the government must never deprive those involved of rights and natural justice, it should never give public approval to any relationship other than that of defined marriage as the social base of this country. Everything possible should be done that may positively discourage other relationships and encourage traditional marriage. The model provisions division III (Appendix A p. 5) and the Report para 90 illustrate how this may be accomplished.

17. The cost of proceedings should continue to be met by litigants. Legal aid limitations should remain much the same as now. Excessive fee appeals should be brought into line with other courts, so that litigants successfully appealing solicitors' costs in cases before the Family Court should also be awarded costs of such appeal.

Report

1. The terms of reference of the Joint Select Committee on the Family Law Act give no definition of 'the institution of marriage', but there was general acceptance among the Inquiry of the definition of marriage contained in S.43 of the Family Law Act, which is as follows:
   "The relation which exists between a man and woman to the exclusion of all others which is voluntarily and publicly entered into and which is intended to last for their joint lives, to afford them mutual help, comfort and support, and to protect and promote the welfare of the children of them, and each of them."
2. Thus stated, the purpose of the Family Law Act as it exists today is to uphold and protect the family unit and each member by regulating the legal aspects of relationships between parents themselves and parents and their children. In the event of breakdown of marriage, there will inevitably be conflict of interests, particularly on questions of custody, maintenance, access and matrimonial property. To buttress the institution of marriage, a Family Law Act should ideally seek to minimise the incidence of family breakdown, but where it has happened the Act should ensure that the interests of parents and children are dealt with equitably.
3. However, there is another dimension to the 'institution of marriage' which must be borne in mind. At the core of traditional marriage, and to be found in every society, is an idea—an idea that it is good for man and woman to live permanently together and to have children and by so doing become part of the enduring cycle of life. It is this inner heart of marriage that forms so obviously such a sane, common-sense relationship, deeply appealing to the most inherent instincts of social mankind, that has stood the onslaughts of centuries and cultures and still survives.
4. What can be damaged or destroyed—and the evidence is that it is being damaged by the Act—is the social fabric surrounding this inner core: the upholding through law and custom and attitude of its permanence and commitment. The IDEA will remain, but its living out is being made increasingly difficult through the operations of the Act. Instead of being a precious heritage surrounded by an upholding, protecting shield of law and custom, marriage is being seen more and more as an encumbrance that restricts freedom. Instead of being taught the strength of its permanence, people are being encouraged by the Family Law Act and its effects to see the disciplined limits of marriage as encroachments on their liberty.
5. Many now enter marriage not as a permanent union with divorce as a last resort, but as a temporary arrangement valid only while it suits one or both parties, and the Act has contributed substantially to this state of affairs. Even marriages that existed prior to the Act have suffered an inherent change through the idea of temporary marriage becoming built into the community.
6. It is noted here that much of the pressure for easy divorce came from, and continues to come from, the legal profession, a fact which is puzzling because that pressure depends so heavily on pleas for the hard cases that legal people

know notoriously make bad laws. Many of these hard cases came to notice during the hearings, and formed some of the emotive basis for pressure to have the Select Committee recommend retaining, even shortening, the 12 months' period of separation for divorce.

7. On balance, it would be better if these hard cases—and indeed all divorce cases—were dealt with purely as matters of law, without the insertion of sociological pressures, and the fact that they were to be so dealt with was known, through the marriage laws, to everyone entering marriage. In the long term, such provision—allied with a lengthening of the term of separation to 2 years—would be more inclined to buttress marriage than any short-term benefits that may seem to accrue to some hard-pressed individuals by shortening the period of separation.

8. Broadly, evidence given to the inquiry shows that the Act is doing actual harm to the institution of marriage, and will continue to do harm until it is replaced by a reconstructed Act embodying the principles of this Report, as contained in Appendices A & D, "Draft Model Provisions for Revised Family Act, including Marriage Contracts."

9. Criticisms of the Act's operation come, particularly, from people who have appeared before the Family Court. The Committee received a large number of submissions from men and women who have been, or believe they have been, victims of the operation of the Act. About 40% of all submissions to the Joint Select Committee—an overwhelming majority of the individual submissions—were presented by individuals with deep personal grievances with the operations of the Act. In view of the substantial number of submissions, this is an extraordinary situation.

10. Organisations representing single parents have given a devastating verdict on the operation of the Act. The President of Parents Without Partners, Mr. D. Slattery, wrote recently. "With my experience of dealing with over 3,000 Family Court case histories in the past 18 months, I can state that the Family Court system is the most inadequate and incompetent type of system we have devised." (Melbourne Herald, 19/5/1980). Mr Slattery wrote in his submission to this inquiry, "The institution of marriage, and the family structure, have been totally weakened by the new Family Court system."

11. The President of the Lone Fathers Association of Victoria, Mr Richard Pearson, submitted to us, "In regard to the organisation and conduct of proceedings of the Family Court of Australia, we feel that the system as it is being applied at present, is a total farce in regard to legal systems and procedures."

12. When the Family Law Act was before Parliament as a Bill, the Senate Standing Committee on Constitutional and Legal Affairs summed up perhaps the best hopes and ideals of its sponsors. It found that the provision of irretrievable breakdown of marriage, and a period of separation as the sole ground for divorce would be proper and in the public interest, and when applied in the context of a broadly based Family Court would bring a degree of honesty and dignity to the administration of Australia's divorce law.

13. This inquiry has established quite clearly that the Senate Committee's optimism was not justified, and 'no fault' divorce as administered by the Family Court has created a whole new range of bitternesses and heartaches in adults and children.

14. The evident discontent arises from the fact that the Act which purports to uphold traditional marriage as defined in Section 43, actually establishes the principle that marriage is an arrangement terminable by either party on 12 months' notice. As Mr Gordon Goldberg, a Solicitor of the Supreme Court of Victoria, pointed out in his submission:

> "This discontent should cause no surprise; for no one doubts that in any other relationship, if one party breaks his undertaking solemnly given to the other, that other should be entitled to at least compensation in the form of damages and, in some circumstances, even to have the defaulter compelled to honour his obligation by a decree of specific performance or an injunction. Why then in the case of the most solemn undertaking of all should the defaulter go scott free? Yet all the Court does under Part VIII of the Act is to distribute the assets and the fruits of earning capacity, according to respective needs when granting maintenance; and taking into account respective contributions when settling property, without necessarily, in the first, asking when and how the need arose; without in the second, the help of accounting records or the guidance given in particular cases by the relevant statute and cases; and without, in any event, a principle for reconciling the conflicting claims of need and contribution. Thus the parties are in a lottery in which a good spouse has no greater chance than a bad."

15. A primary recommendation of this Dissenting Report is that the Family Court should be abolished, and the Court of original jurisdiction should be a State Court exercising federal jurisdiction, and the Family Division of the Federal Court of Australia should be incorporated to exercise appellate jurisdiction. English experience which led to the passing of the Judicature Acts provides ample warning of the inconvenience and dangers of special narrow jurisdictions, and the Family Court as it now operates is a prime example, with its multitude of different titles, customs, procedures, taxing rules and even special psychological conditions for the appointment of judges. Incorporating the Court as recommended would bring it back into the mainstream of Australian jurisprudence, where it should be. The main diversion from the mainstream, of course, is in the very core of the Act—its elimination of guilt and innocence through "no fault" divorce.

16. Unless the fundamental defect of "no fault" divorce is removed, and the operations of the Court are so amended, any well-intentioned efforts by Parliament to tinker with the Act to make "no fault" work are doomed to failure, and in a few years another Parliament will have to try to recover what they might from the wreckage.

17. The present Family Law Act also almost totally preoccupies itself with the termination rather than the formation of marriage, and tends to discourge adequate preparation for marriage. The present Act is logically unsound in principle, fails to buttress the institution of marriage, places the convenience of one party above the legitimate rights and interests of the other or the children, and reduces what should be a permanent union into a temporary cohabitation.

18. And certainly extending easy divorce, as advocated in the Select Committee Report, to become virtual "divorce by post" (Which has operated in U.K. for many years and the divorce rate there has risen to almost half the annual marriage rate) would only make matters worse rather than better.

19. It is easy to understand that the operations of the Family Law Act have met with qualified approval, even satisfaction, in some quarters—among some members of the legal profession, for example, and amongst those who have found it the means of being freed from ties that they have found intolerable for a variety of reasons. But behind the view of many of these people is apparently the belief that the only alternative to the Family Law Act is the old Matrimonial Causes Act, and so they express a strong preference for the Family Law Act. Their belief is, of course, incorrect, and what should have come from this inquiry (but has not in the Select Committee's Report) is a proper and workable alternative Family Law Act which will, in fact, buttress traditional marriage.

20. Attached to this Report is a "Draft Model Provisions for a Revised Family Law Act, including Marriage Contracts", with some comment and explanation and subsidiary suggested legislation. These embody the principles of this Report and their embodiment into a revised Family Law Act would give effect to those principles.

21. It is to this need to buttress marriage that this Dissenting Report has primarily addressed itself. The first question that occurs is what kind of society is the government wishing to establish or maintain through its laws—one that upholds traditional marriage, or one that regards marriage as open-ended, or both; or does it wish to encourage, even negatively, the growth of de facto relationships, homosexual families and other alternative relationships? At the same time it must bear in mind the over-riding factor of concern for the welfare of children.

22. It is a proper role for government to legislate for the conditions under which the civil contract of marriage can be entered into and dissolved, and for the wellbeing and security of the nation. The overriding personal experience from the inquiry is that this will best be assured on the foundation of laws and customs that uphold and buttress permanent marriage and family life.

23. The harsh practicality of the huge drain on the economy to maintain all the consequences of marriage and family breakdown, reinforces the need for government to act decisively to uphold stable marriage and family life. The inquiry brought forward substantial evidence from many groups and organisations committed to the maintenance of the family that the Family Law Act is encouraging the trend towards casual, ill-prepared entry into marriage: that it has encouraged many more people to regard it as 'open ended' rather than permanent.

24. Evidence shows that before the Act there was a tighter understanding and acceptance of the permanence of marriage and family, and the need for such permanence, even among those who found themselves in heartbreaking circumstances through deteriorating marriages. The Act itself, through its educative effect of promoting 'no fault' divorce and such a short separation as 12 months as the only ground for divorce, has played a substantial part in breaking down this acceptance throughout the community.

25. While reliable statistical evidence on this question is limited, the 1976 Census shows a disturbing increase in the incidence of divorce among marriages contracted within the previous 5 years. In 1976, the proportion of marriages ending in divorce among this group increased eightfold in comparison with the 1971 census, whereas the increase in marriages of longer duration were fourfold or less. The ease with which marriages may be terminated, and the absence of contractual obligations to the other party in the event of dissolution of marriage, tend to discourage adequate preparation for entry into the married state.

26. The Family Law Act devotes time to recognising the permanence of marriage, yet its actual effect was to generate an immediate increase in divorce. Then it must be borne in mind that the continued operation of the Act is producing a generation of young people growing up exposed to 'no fault' divorce as a fact of life. The longer, therefore, that 'no fault' divorce remains, the more young people will have time to absorb its philosophy.

27. It was represented by some groups appearing before the Joint Select Committee and making submissions, that the Act had improved family life—that its 'humane' divorce laws served to protect the family by improving the home environment for children, and to resolve conflict constructively. If this really were so, why do the same organisations call for and apparently need increasing amounts of money and

more shelters and more legal aid for families affected by marriage problems three years after the 'humane' divorce of the Act came into effect?

28. The submissions to the inquiry provide ample evidence of the deep discontent caused by the working of the Family Law Act. This was inevitable, for the Act was a radical change introduced by those who obviously forgot that if one repeals a rule one must beware the evil which the rule was intended to combat. It is no answer that Parliament cannot reform society and the law should therefore only reflect current mores. It is true that it is tyrannical to enforce laws which depart from widely accepted custom; but the capacity of the law to generate social change has never been disproved. Some notable illustrations come easily to mind.

29. For instance, while laws were upheld against abortion, the numbers performed legally and illegally were held to fairly well-defined limits. Since the breaking-down of the laws by judicial interpretations (brought about, it should be noted, by pleas for 'hard cases') the numbers have risen to staggering heights. Here, the change in the law's application and interpretation changed something that was regarded as a disgusting crime some years ago, into a socially acceptable and therefore 'right' act, widely practised and urged.

30. Another pertinent illustration is from an eminently practical source, Mr Bill Crews, director of the Wayside Chapel in King's Cross, Sydney—a man daily in contact with people and events in that area. He has stated that the incidence of prostitution there has increased since the laws forbidding soliciting were abolished by the N.S.W. government. As a result, more people including minors were practising it, and more people were in there buying. (The Bulletin April 8, 1980, p. 40).

31. There are also the classic cases of seat belt legislation and the Factory and Health Acts, and the laws against slavery.

32. In any event, quite law abiding men and women are tempted to take advantage of bad laws (like the Family Law Act): hence the need to place marriage again within the shield of the law, in the same way as the law gives protection to other contractual relationships against raids by outsiders, and against default by one party.

33. It is not, of course, statistically possible to measure happiness and unhappiness. Certainly no one would be foolish enough to maintain that traditional marriage always brings unalloyed happiness, or that there are not many other influences at work in the breakdown of modern family and home.

34. But the inquiry has produced clear evidence that Australia's family life is no happier overall under the easier divorce of the Act than it was when divorce was harder to obtain. Indeed there is some sound evidence for the opposite view. At the same time, easy divorce has imposed on the community an excessively high financial burden, for the public purse must pay the total cost of the Family Courts and their staffs, counsellors, facilities, legal aid and so on, the Family Law Council, and now the Institute of Family Studies, as well as the costs of caring for the people suffering hardship resulting from the increasing numbers of marriages breaking up under the Act which purports to support marriage.

35. There are also clear signs of 'empire-building' in the submissions of publicly paid bureaucracies, all of who call repeatedly for more government money for their work, more judges, counsellors, researchers. However well motivated they are, the consequences of their submissions would be an even heavier drain on the public purse.

36. If there were cogent signs that all this structure and expense were directly resulting in a happier Australian community and a more stable family life, there would be less cause for complaint; but the opposite seems to be the case. If, therefore, easier divorce is still creating such a growing number of problems needing more people and money to handle them, what logical basis is there for trying to make divorce easier still? It is beginning to appear that the more money spent, the more bureaucracy and sociological engagement we have, the more divorce we have.

The Jupp Paper on Statistics in the Joint Select Committee Report

37. A Kathleen M. Jupp was commissioned to prepare a paper on the statistical evidence available to the Committee, primarily to help the Committee statistically assess the impact of the Act on the institution of marriage and the family (term of reference (ii)).
Had the paper been impeccable it may have been helpful. However, careful examination of the paper (as given in detail commencing paragraph 39 hereafter), shows serious defects and any findings of the Joint Select Committee based on its analysis must be suspect unless it could be clearly shown that such findings were reached with full allowance being made for the paper's shortcomings and inaccuracies. Indeed it is surprising that given the paper's serious fundamental flaws, the Committee didn't discard it entirely as either helpful in referring to the relevant term of reference or as a proper marshalling of demographic and social information available.

38. Instead the Committee has made considerable use of the paper in its findings, conclusions and recommendations to Chapter 3 of the Report and has retained 'no fault' divorce largely on the basis of the seriously suspect Jupp conclusions which the Committee appears to have taken as a foundation of fact.

39. The statistical basis on which an analysis of the effect of the Family Law Act is made, must include a careful assessment of the divorce statistics for the past ten years, covering the period before and after the introduction of the Family Law Act. The following table sets out the number of dissolutions in Australia over that period.

Divorce in Australia*

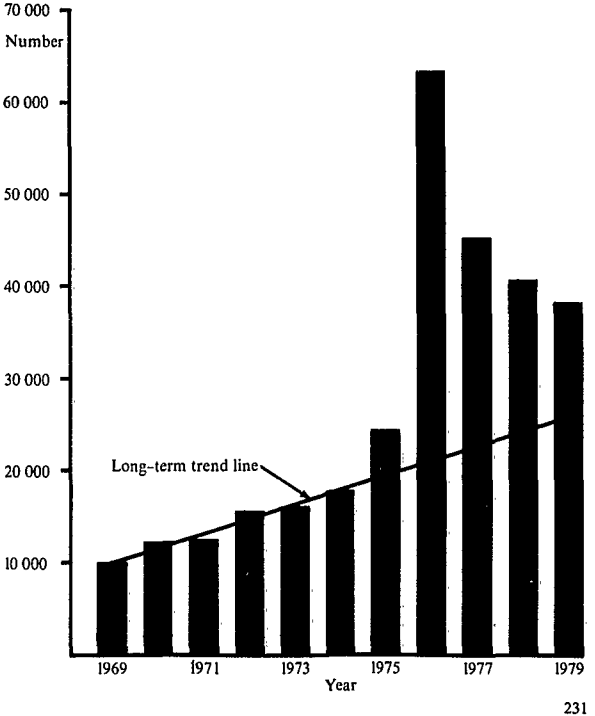
Year	*Number*		*Dissolutions per 10,000 population*
1969	10,984		8.9
1970	12,247		9.8
1971	13,002		10.0
1972	15,707		11.9
1973	16,266		12.1
1974	17,744		13.0
1975	24,307		17.6
1976	63,267	15,743 (Mat. Causes) 47,524 (Fam. Law Act.)	46
1977	45,175		32
1978	40,633		29
1979	38,021	(p)	—

* includes nullities.
(p) provisional statistics which will be revised upwards as the Bureau of Statistics is advised of further dissolutions by the Court.
Sources: Divorce Australia (Bureau of Statistics) Cat.3307.0. Australian Demographic Statistics Quarterly (Released June 1980).

40. These statistics show that the number of divorces jumped rapidly with the introduction of the Family Law Act. Jupp correctly associates the 1976–77 hump in the divorce rate with the easier conditions for dissolution prevailing after 1976, when the Family Law Act took effect; but then suggests that the divorce rate has now returned to the regular upward gradient evident before the Act was introduced. This interpretation does not accord with the facts as shown in a graphical display of the statistics tabled above. (See accompanying graph).

41. A careful examination of the figures shows that the divorce rate is now moving towards a new, higher level, above that shown in the long-term trend of dissolutions granted before the introduction of the Family Law Act. If the trend of

Dissolutions granted (Australia)



recent years is continued, the number of dissolutions granted in 1980 will be approximately equal to that of 1979, and from then on the number of divorces will rise again at a level considerably higher than the long-term gradient for dissolutions under the old Act. This conclusion is strongly reinforced by the fact that, in the first four months of 1980, 13,358 dissolutions were filed in Australia. On an annual basis, this suggests that the number of dissolutions in 1980 will be around 40,000—which is even higher than the figure for 1979.

42. The statistics cited in some parts of the study, enclosed with the Select Committee Report, are also defective. In Table III-5 of Section III-22, the figures for dissolutions in 1978 are listed as 39,268. The Family Court is cited as the authority for the figures. But according to the Bureau of Statistics, whose figures are more up to date, the actual figure is 40,633. The Jupp report lists the number of dissolutions for 1979 as 35,787. But the latest provisional figures issued by the Bureau of Statistics are much higher—38,021, and the final figures are expected to be higher again, as the Bureau is notified of further dissolutions.

43. These statistics are extremely important in an evaluation of the impact of the Family Law Act on the institution of marriage in Australia. If Jupp's figures were correct, the conclusions in the study would at least be arguable. The figures are incorrect, and the conclusions are consequently in error.

44. But the Jupp report is open to fundamental criticism on other grounds. The author states in the introduction that "fundamental as the evidence is in indicating the range of views held by the contributors (to the Parliamentary Inquiry), in the nature of the case much of it consists of value judgments." It is a matter of fact and therefore deep concern to this Dissenting Report that the Jupp paper itself contains many opinions, conclusions and recommendations which have no reference to the statistical facts presented. A disturbing feature of the Paper, and one of the reasons for this Dissenting Report, is that conclusions and recommendations are, in a number of instances, reached on the basis of the author's opinions, without reference to the terms of reference given to the Select Committee, and in some instances unrelated to the evidence presented. The author frequently regrets the lack of adequate information, but still manages to reach firm conclusions and recommendations.

45. Many of the paragraphs of the Introduction and Conclusions in the Jupp Paper are, to say the least, arguable, and some of the main concerns are indicated here.

46. Jupp assumes that women wish to participate in the work force. Apart from the unwarranted assumption that homemakers do not work, the question should be asked: how many women are conscripted into the workforce by economic necessity? And how many have found themselves divorced or deserted and without adequate maintenance as a result of the changes wrought by the Family Law Act? The many submissions made by individuals who have been unjustly treated by the operations of the Act suggest that, in many cases, the existing Act itself is contributing to the pressures which deny to women real freedom of choice as to whether or not they enter the paid work force. The research study does not examine this issue.

47. Another matter of concern is Jupp's failure to distinguish between marriage—the legal relationship between a man and woman sanctioned by the State and defined in the Family Law Act—and cohabitation, the living together of a man and woman without the mutual contractual obligations being enforced by the State.

48. One result is that no clear distinction is drawn between marriages and de facto unions other than perhaps that statistics are difficult to collect on the latter. One serious omission resulting from this lack of distinction is that the function of marriage in protecting and nurturing children is minimised. Jupp writes that in contemporary Australia there has been a profound modification in the nature of marriage in protecting and nurturing children is minimised. Jupp writes "that in institutional basis to an individualistic one, which in some cases remains childless but which in the great majority of marriages produces children. The principal function of marriage then becomes companionate, whereas the traditional marriage is an arrangement mainly for the care and nurture of children, which is also one of the chief preoccupations of modern government.

49. It is not clear whether Jupp is describing a state of affairs or endorsing it. In any case, the role of caring for and nurturing children has to be accepted by governments, become one of their 'preoccupations', particularly in the event of breakdown of the marriage.

50. Jupp suggests that research into such matters as sexual relations outside marriage be undertaken, yet it is difficult to see the relationship of this recommendation to the terms of reference of the Joint Select Committee. On the other hand, she does not even consider such problems as the real standard of living and its effect on the stability of single-income families, the recruitment of large numbers of mothers into the workforce, the effects of two working parents on children, the correlation of latch-key children and working mothers, the correlation (if any) between juvenile delinquency and divorce, and similar matters that are properly within the terms of reference. Marriage counselling is mentioned, but no suggestion is made of implementing it BEFORE marriage, rather than at a stage when divorce is almost inevitable.

51. Jupp also argues that "it is WIDELY UNDERSTOOD that there is no necessary coincidence between the marriages that have broken down and the number of divorces." But the absence of detailed statistical evidence together with the use of imprecise language such as 'widely understood' and 'no necessary coincidence' indicate that the conclusion is an opinion of the author's, and that it is just as probable that in the overwhelming majority of cases THERE IS a coincidence between the number of marriages that have broken down and the number of divorces. Furthermore, Jupp relies on American experience, without referring to any differences in social, cultural, religious, demographic or legal structures between the two nations.

52 The Jupp report too often substitutes opinion and conjecture for detailed statistical analysis. It is unreliable in providing the foundation of facts on which the Select Committee could base conclusions, the foundation of facts which it was ostensibly designed to provide.

Marriage Counselling

53. There is also evidence from the inquiry strongly pointing to the dubious advantages of much 'marriage counselling'. Such counselling may be well motivated, but its effects are clearly governed by a number of subjective factors which can probably never be overcome—including particularly the motivation and personal philosophy of the marriage counsellors, and the willingness and ability of those counselled to accept the counselling.

54. Clearly marriage counselling by people who do not themselves believe in the primacy of supporting the traditional view of marriage could easily direct the partners away from reconciliation, especially when such marriage counselling is reinforced by a Family Law Act which abolishes guilt, conduct or behaviour as grounds for divorce and therefore abolishes innocence.

55. As an illustration, there is the statement of the Director of the Marriage Guidance Council of Victoria (Dr Warwick Hartin) at a recent Continuing Education seminar at Monash University, that he does not believe people should necessarily aim for a single life-long partner. "A marriage is not a failure" he said "if it meets people's needs for a time . . ." It would obviously be unreasonable to expect that all the marriage counselling from his official State government organisation would be towards making marriages work permanently.

56. It is possible that the almost total acceptance by marriage guidance organisations who appeared before the inquiry of the striking down of innocence in divorce cases has left them with no real role, for how is it possible to reconcile people neither of whom has done anything wrong?

57. For the Family Law Act provides no sanctions against the one who breaks the marriage and no protection for innocent parties involved even without their own volition. The Act deliberately excludes the concept of fault, so there is no guilt and therefore no innocence, let alone legal recognition or protection for innocence. It has, in fact, been represented to the Inquiry that there is no such thing in marriage break-up as an 'innocent party'. This stands out as negative cynicism, not borne out by the evidence given by aggrieved spouses on their own behalf and the behalf of their innocent children.

58. There is also the added incongruity that, while fault is supposed to be eliminated, the Act still provides for 'any fact or circumstance' which in the opinion of the Court the justice of the case requires, in matters of maintenance. However, the judges steadfastly refuse to allow the words 'any fact or circumstance' to be interpreted in terms of conduct, and rely completely on 'needs and resources' in deciding maintenance, with a series of resulting bitternesses and complaints.

59. Finally, when the Family Law Act was being discussed as a Bill, one mechanism praised as likely to contribute substantially to possible reconciliations was the provision for court counsellors. The court counsellors have, in practice, become process workers whose prime objective is to bring about more efficient divorce through proper use of Court machinery, which minimises—albeit brutally sometimes—the areas of contention before hearings. Such counsellors have no part in reconciliation counselling.

Public Hearings

60. Public hearings of the Family Court are presently very restricted in terms of admittance of the public and publicity. All hearings of courts concerned with dissolution of marriage should be public, with the names of the parties suppressed for publication only where there are children under 18 years of age directly involved.

61. This recommendation is based on the uncompromising principle that except where national security is involved there should be no secret, private legal hearings in this country. Many cases were drawn to notice where parties to the dissolution of marriage have become convinced that the secrecy of the hearings has prejudiced their chances of obtaining justice, and whether this has been so or not, justice must publicly be seen to be done and the decisions of the courts must be open to scrutiny and valid criticism if necessary.

62. A recommendation like this is only made after long and careful consideration, and even somewhat reluctantly, but it is necessary to preserve the integrity of the whole dissolution of marriage proceedings.

63. The Chief Justice of Western Australia, Sir Francis Burt, said in the Perth Sunday Times on 6th July, 1980, "I was never happy on the Bench during the (newspaper reporters') strike. There were no newspaper reporters recording our directions and decisions. We were working without any public scrutiny . . . and that's not good."

64. This principle holds good for all of jurisprudence in Australia, and is also valid for the Family Court.

De Facto Relationships

65. The question of de facto and other alternative relationships has also been raised in this inquiry. It has sometimes been argued that easy divorce should make such relationships unnecessary, while others consider that making marriage harder to get into and harder to get out of will encourage more such alternative relationships.

66. In recent years, despite easy divorce, there is evidence that there has been a growth rather than a diminution in the number of non-traditional relationships producing legal problems, notably over children and property. It is not possible to decide how much of this is actually due to the Act, but evidence was presented of possible connection.

67. The principal difficulty in this area is that recognising legal rights in such relationships could involve some concomitant breaking down of the absolute legal recognition of traditional marriage as defined as the legal norm. However, recommendation 8 (also Report, para 90) provides several forms of marriage contract, and this wide choice of contract options may hopefully encourage the regularisation of some de facto unions.

68. Therefore the principle stands that, while de facto relationships must never be used to deprive those involved of rights and natural justice, no action should be taken by government which could in any way be construed as extending legal equality to such relationships.

Annulments

69. Annulments are not regarded as special and separate from divorce by the present Family Law Act. The basic ground of 12 months' separation is the only ground.

70. It is essential that a revised Family Law Act should provide for annulments on a number of established grounds, and that such applications for annulments should have priority of hearing over any divorce matter and must not depend on any length of separation.

71. The critical difference between divorce and annulment for many people has not been recognised properly by the present Family Law Act: the fact that for many people re-marriage is possible only after annulment.

Family Law Council

72. One of the major findings of this Dissenting Report is that the matters concerning marriage and its dissolution are so important that nothing less than a continuing committee of every Parliament—constituted much along the same lines as this Joint Select Committee—should perform the functions now performed by the Family Law Council.

73. Such a Committee would be far more representative than the Family Law Council and certainly more cost effective.

Institute of Family Studies

74. It is recommended that the Institute of Family Studies be abolished before much more money is wasted in its establishment and bringing into operation.

75. In documents presented to this inquiry, the Institute's own stated first aim emphasises its theoretical nature, and it is very difficult indeed to see how marriage can be strengthened by theory, statistics and yet another government bill for the costs of bureaucratic research projects. Whatever marriage statistics are required can easily be provided by the Courts.

76. To continue with this Institute will entrench into our system further the unacceptable notion that what should properly be fundamentally matters of law in the dissolution of marriage, can remain the field for sociologists of various types. There have even been suggestions made to the inquiry that sociologists should sit on the Family Courts and hear matters with judges, which is at least presumptuous.

Draft Model Provisions for Revised Family Law Act (Including Marriage Contracts)

77. Parliament has the duty of legislating for the overall good of the nation, now and for the future if possible. The weight of evidence, testimony and personal experience shows that the Family Law Act is not meeting this criterion, particularly in 'no fault' divorce which should be legislated out of existence.

78. This Dissenting Report believes that if the Family Law Act is to fulfil its objectives and justify its title, the Marriage Acts and Family Law Act must be consolidated and drastically amended in its basic principles, to produce a statute which regulates the form and duration of a marriage, the legal aspects of relations of the parties thereto, each to the other and to the children of either or both of them (not only after its dissolution but also during its subsistence) and the relations of the marriage partners with third parties, in a manner that ensures justice and equity to all.

79. Appended hereto (Appendix A) is a draft embodying the principles which ought form part of such a law. It is not complete legislation, but spells out the principles of this Dissenting Report for incorporation into a total review/revision of the Family Law Act.

80. It is noted that the draft makes no provision for transitional provisions which must necessarily be enacted. However, it is proposed that the transitional provisions give effect to the following principles:
    (a) As the Reviewed Family Law Act is predicated on the existence of a contractual relationship between spouses, provision is to be made not only for the validation of marriages entered into prior to the enactment of the revised Act, but also for the deeming of all prior marriages to be in a contractual form in accord with the provisions of the revised Act.
    (b) The form of contract which is contemplated for prior existing marriages is a contract of marriage determinable by the Court on just cause. Not only will this form of contract more accurately reflect the aspirations of most married persons, but also such contracts will be in accord with the general intention of the law enabling dissolution of marriages for just cause which applied prior to the enactment of the existing Family Law Act.
    (c) The transitional provisions would also recognise that many persons may be dissatisfied with the 'deemed contract of marriage'. Provision should be made to enable all such persons, subject to the mutual consent of the spouses, to alter the terms of the contract of marriage within one year of the Act being proclaimed, free of any charges which would otherwise apply to the registration of contracts. While the deeming of a contract will give certainty to the existing marriage relationships, the encouragement of alteration without charge of the deemed contract will ensure that all persons subject to the revised Act can regulate their affairs as they wish.

81. The proposals contained in the draft DO NOT restore the situation which existed before the present Family Law Act, for the basic premise is the freedom of the subject to arrange his own affairs. But that freedom cannot be exercised in disregard for the just expectations of another, especially of expectations which have been induced by the subject's voluntary assumption of obligations, and in consideration of which the other has entered into a certain course of conduct at the request of the subject.

82. Such a disregard is not permitted by the law in connection with obligations in other fields, and marriage must not be discriminated against in this regard.

83. The basis on which the Family Law Act should operate is to treat marriage (while bearing in mind its peculiar and special incidents) much the same as any other agreement which is binding in law, including compliance with the law's general insistence on the certainty of its terms. Since a bare agreement to enter a contract—as distinct from a status which has been the traditional legal concept of marriage—is not binding, this treatment will lead to the lapse of actions for breach of promise of marriage, unless there is a special consideration of the promise. In the light of *Russell* v. *Russell*, special consideration will have to be given to this matter.

84. The aims of the draft model legislative provisions suggested are twofold:
    (i) To change the Family Law Act into a statute deserving that title, that is into an Act to govern:
        (a) the making of the marriage;
        (b) the subsistence of the marriage; and
        (c) the dissolution of the marriage.
    (ii) To attempt to ensure that couples give adequate consideration to the mutual rights and obligations involved in marriage, by signing a contract setting out the rights and obligations of the parties, and the conditions under which the marriage may be dissolved.

85. Evidence given to the Joint Select Committee shows clearly that the ease of dissolution of marriage under the existing Act means that entry into marriage is taken less seriously than it should be and would otherwise be. Further, 12 months' separation is not sufficient to establish irretrievable breakdown of marriage. In this regard, the law changed in one step from 5 years' separation to 12 months' separation—a radical and serious change. A mandatory 2 year period would more realistically confirm irretrievable breakdown of marriage than the present 12 months.

86. With respect to the second aim, all sections of the community agree that a high rate of divorce has undesirable social consequences, two in particular being the effect on any children of the marriage and the strain on the Courts and the economy, with long delays and high costs.

87. Many individual submissions to the Inquiry recommended that couples be required by law to give adequate prior consideration to the relationship into which they are about to enter on marriage. This Report agrees with the soundness of this proposition, and it is therefore recommended that a formal contract be signed before marriage, and provision for one is written into the draft Model Provisions.

88. The model provisions ensure that in all cases a minimum of 2 years' separation is required prior to obtaining a dissolution. It is sometimes argued that once a marriage is over, the parties should not be forced to wait a lengthy period before a divorce is granted. A more positive view is that the prospect of two years' separation before divorce, known about at the time of marriage, would be a stabilising influence on prospective marriage partners.

89. With respect to the concept of separation, it is suggested that two variations be made to the present rules:
   (i) The separation must be registered and is effective from the date of registration; and
   (ii) There is to be no break in the separation and the concept of separation under the same roof is removed.

90. In the Model Provisions, Division III (Appendix A), provision is made for marriages to be formed by contracts allowing dissolution on 2 years' separation: by mutual consent of the parties, on the notice of one party to the other, or for just cause. While the whole thrust of this Report and Recommendations has been to buttress the traditional form of marriage—and marriage contracts themselves have this intention—it is recognised that there are within the community people who would wish to enter marriage contracts providing for mutual consent dissolution, or dissolution on the notice of one party to the other, rather than only for just cause. While such contracts may not be ideal in the terms of this Report, to preserve the freedom of choice of the individual, provision has been made for these choices to be made at the time the marriage contract is signed, before marriage. Hopefully, these provisions may also help in and encourage the regularisation of some de facto relationships.

91 Besides being drawn up to incorporate the broad principles which this Dissenting Report believes are necessary and desirable to buttress the concept of traditional marriage, the draft Model Provisions contain some practical provisions on details that should help underpin this concept of permanence:

92. 1. *Statement at Marriage:* Provision is made that every registered marriage celebrant should be required to provide to the parties involved full and specific information on the permanence, legal requirements and basic undertakings of marriage, and to specify before performing the marriage complete satisfaction that the parties are fully aware of the permanence and nature of the commitments they are undertaking.

93. Except when they choose voluntarily to forego them, marriage celebrants are paid fees for the service, and it is not unreasonable to expect them to conform with an instruction like this.

94. 2. *Contract and Property Regime:* Provision is made for the parties entering into marriage to be obliged by law to enter into a form of marriage contract, in which are spelt out the rights, obligations and a property regime for the marriage.

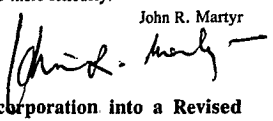
95. Property regimes have been widely discussed during the many months of the inquiry, so the Joint Select Committee was fully aware of the problems that introduction of a contract of marriage may cause at first. However, anyone who has sat in on Family Court hearings, or who has personal knowledge in this area, knows the massive problems and dissatisfactions that can be caused by property divisions, no matter how even-handed they may seem to be.

96. Marriage involves a contractual undertaking and serious responsibilities and realities like property, possessions, debts and children. Should the marriage fail, then a contract existing from before the marriage is an unequivocal statement of property division and related matters known and understood to both parties at all times. Provision could be made for varying the contract over the years by mutual consent, but in no other way.

97. 3. *Form of Marriage:* Provision is made for a definite basic form of words based on the traditional marriage concept, as defined in Section 43 of the present Family Law Act, to be used in all marriage ceremonies.

98. These suggestions are contained in the draft Model Provisions to ensure that, with marriage as with any other partnership contract, the parties know their rights and obligations from the outset; and by the very act of signing a formal contract, they will contemplate the whole contract of marriage more seriously.

John R. Martyr



Appendix A

Some Draft Model Provisions for Incorporation into a Revised Family Law Act

(to give effect to the recommendations of this Dissenting Report)

Divisions

I Definition of Marriage

II Preconditions for Formation of a Marriage, and Ceremonial Requirements — right to avoid upon subsequent discovery of disqualification/defect

III Determination of the Marriage

Division I

1. Marriage is the union which exists between a man and a woman to the exclusion of all others which is voluntarily entered into and which is intended:
   (a) to last for their joint lives.
   (b) to afford them mutual help comfort and support.
   (c) to protect and to promote the welfare of the children of them and of each of them.

Division II

2. A marriage may be formed only between a man and a woman:
   (a) of whom each is then of full age by the law of the place where he or she is domiciled immediately before the formation of the marriage.
   (b) of whom each is then of mind sufficiently sound to appreciate the nature of the responsibilities attaching to marriage.
   (c) of whom each is then capable of consummating the marriage with the other.
   (d) of whom each is not then (unless to the knowledge of the other) suffering from a venereal disease in a communicable form.
   (e) of whom the woman is not then (unless to the knowledge of the man) pregnant by another man.
   (f) of whom neither is then married to another.
   (g) of whom neither was or has been engaged in homosexual activity or sexual activity with animals at the time of the marriage except with the knowledge of the other.
   (h) who are not within the degrees of consanguinity prohibited by this Act.
   (i) who are not within the degrees of affinity prohibited by this Act.

3. Any person who goes through or celebrates a ceremony of marriage in accordance with this Act knowing either or both of the bride and groom to be not qualified under section 2 of this Act shall be guilty of an offence.

4. A marriage shall be formed when it is celebrated by a ceremony of marriage in accordance with this Act between a man and a woman of whom both are qualified under section 2 of this Act and of whom each goes through the said ceremony of his or her own free will, knowing the identity of the other and the nature of the ceremony.

5. (1) A ceremony to celebrate a marriage in accordance with this Act:
   (a) may be conducted on any day, at any time and at any place.
   (b) shall be conducted by a person authorised to celebrate marriages under this Act.
   (c) shall be conducted in the presence of witnesses of at least two persons of full age.
   (d) shall include the words spoken by each of the parties to the other:
   "I call upon the persons here present to witness that I A.B. (or C.D.) take thee C.D. (or A.B.) to be my lawful wedded wife (or husband)."
   after the words spoken by the celebrant to the parties:
   "I am duly authorised by law to celebrate marriages.
   Before your are joined in marriage in my presence and in the presence of these witnesses I remind you of the solemn and binding nature of the relationship into which you are now about to enter.
   Marriage according to the law in Australia is the union of a man and a woman to the exclusion of all others voluntarily entered into for life, for the provision of mutual help comfort and support and for the protection and the welfare of any child already born to you or either of you and of any child who may hereafter be born of or received into your union."
   or words to like effect.
   (e) shall include following the speaking of the said words the signing by the parties and the witnesses and the celebrant of an acknowledgement in the prescribed form that the marriage has been celebrated, which acknowledgement shall be conclusive evidence that a ceremony has taken place appropriate to celebrate the marriage in accordance with this Act.
   (f) may otherwise be conducted in such form as shall be agreed upon by the parties and the celebrant.
   (g) shall be preceded by at least 3 months previously by the parties giving to the celebrant:
      (i) notice in the prescribed form of their intention to marry.
      (ii) a certificate in the prescribed form signed by a solicitor that after discussion with him and apparently in full understanding thereof the parties have executed a contract of marriage as provided in this Act.
      (iii) certificates of their respective births from the custodians of the relevant official records or other proof of their respective ages.

   (2) Each marriage and the contract executed by the parties thereto pursuant to this Act shall be registered in the prescribed form and manner but only on production to a Registrar of the said acknowledgement.

6. Anyone who celebrates or purports to celebrate a marriage in Australia otherwise than in accordance with section 5 of this Act shall be guilty of an offence.

7. If the acknowledgement referred to in section 5 of this Act or a copy thereof certified as true by a Registrar cannot be produced the celebration of a marriage in accordance with this Act may be proved in accordance with the rules of evidence prevailing in the Court where the question arises.

8. Unless the course of dealing between the parties has been such as to show a different intention each party who goes through a ceremony of marriage in accordance with this Act shall be deemed to have warranted and only to have warranted to the other that he or she is to the best of his or her knowledge information and belief qualified under section 2 of this Act to marry the other.

9. (1) Where at the time of the celebration of a marriage either or both of the parties thereto was disqualified:
   (i) by reason of paragraphs (a) or (b) of section 2 of this Act no one other that
      (a) the party who was thus disqualified or,
      (b) the person for the time being in whose custody that party is or in whose control are that party's affairs or,
      (c) the legal personal representative of that party
      shall be entitled to assert on the ground of disqualification that the marriage has not been formed, and all entitlement to make such an assertion shall be extinguished if within a reasonable time after becoming qualified under both the said paragraphs the said party has failed to repudiate the marriage.
   (ii) By reason of paragraph (c) of section 2 of this Act no one other than:
      (a) the parties to the marriage, or
      (b) either of them, or
      (c) their respective legal personal representatives,
      shall be entitled to assert on the ground of such disqualification that the marriage has not been formed, and neither party nor his or her representative shall be entitled to make such an assertion unless within a reasonable time after such disqualification ought reasonably to have become known to that party he or she has repudiated the marriage.
   (iii) by reason of paragraph (d) of section 2 of this Act no assertion on the ground of such disqualification that the marriage has not been formed shall be made unless by a party not so affected (or his or her legal personal representative) and that party has (before or within a reasonable time after he or she ought to have known of the disqualification) repudiated the marriage.

9. (2) Where at the time of the celebration of a marriage the bride was disqualified by reason of paragraph (e) of section 2 of this Act no one other than the groom or his legal personal representative shall be entitled to assert on the ground of such disqualification that the marriage has not been formed and the groom or his representative shall not be entitled to make such an assertion unless before or within 12 months after the delivery or miscarriage resulting from the relevant pregnancy the groom has repudiated the marriage.

9. (3) Where a marriage is celebrated by a ceremony in accordance with this Act through which either or both of the parties goes while mistaken as to the indentity of the other party or as to the nature of the ceremony or not of his or her own free will no one otherwise than on behalf of a party thus mistaken or under duress or his or her legal personal representative shall be entitled to assert on the ground of such a mistake or duress that the marriage has not been formed and no one shall be entitled to make such an assertion if the said party within a reasonable time of becoming free of the mistake or duress did not repudiate the marriage.

10. (1) Subject to section 9 of this Act,
   (i) any of Her Majesty's attorneys-general or
   (ii) any person with an interest in the subject matter,
   may apply to a Court having jurisdiction under this Act for a declaration whether or not there is or has been a marriage formed between a particular man and a particular woman.
   (2) The court shall hear and determine such application as expeditiously as possible.

Division III

11. A marriage once formed in accordance with this Act shall continue until the death of either party or determined in accordance with this Act.

12. (1) A marriage once formed in accordance with this Act may after the parties have lived separately and apart for a continuous period of 2 years be determined,

(a) by the mutual consent of the parties; or

(b) in the case of a marriage agreed by the parties in the contract of marriage as provided in this Act to be determinable on notice on the giving by one party to the other in the prescribed manner of a notice in the prescribed form; or

(c) in the case of a marriage agreed by the parties in the contract of marriage as provided in this Act to be determinable for just cause on a Court having jurisdiction under this Act finding the marriage to have irretrievably broken down for just cause as defined by this Act.

(2) The period of 2 years referred to in the proceeding sub-section shall be calculated only from the date on which the separation of the parties has been registered in accordance with this Act.

13. (1) Just cause for the dissolution of a marriage shall consist in:

(a) wilful conduct (without just cause or excuse) on the part of a spouse which involves that spouse in breaking the consortium or of which the probable consequence is (and ought reasonably to be known by that spouse to be) the expulsion or withdrawal of the other spouse from the consortium; or

(b) an event or sequence of events occurring without the default of either spouse which reasonably renders the consortium intolerable to either party.

(2) Without detracting from the generality of sub-section (1):

(i) each of the following shall (if committed without just cause or excuse) amount to such "wilful conduct" as is there referred to:

(a) adultery or any other activity with a person of either sex gravely inconsistent with the spouses' union.

(b) sexual activity with an animal.

(c) desertion, for such a period or in such circumstances as to render reconciliation unlikely.

(d) cruelty, whether or not it causes injury to the health of the other spouse, whether by word or by deed and whether by act or by omission to act.

(e) habitual drunkenness.

(f) repeated refusal to engage in sexual intercourse.

(g) habitual failure to earn and apply for the benefit of the spouses' union an adequate income.

(h) a serious crime.

(i) frequent crimes of any kind.

(j) substantial wastage of assets otherwise available for the benefit of the spouses' union.

(ii) each of the following shall amount to such "an event or sequence of events" as is there referred to:

(a) mental or physical illness which for an extended period renders a spouse unable to afford to the other help comfort and support or unable to understand the nature of marriage.

(b) protracted inability to engage in sexual intercourse.

(c) the development of a protracted incompatibility between the temperaments of the parties.

(d) protracted separation of the parties.

PROVIDED ALWAYS THAT no cause or excuse shall be deemed to be just which comprises the wilful conduct of or which has been conduced condoned connived at or waived by the spouse alleging it AND THAT just cause or excuse shall negate default.

14. (1) The Court on being satisfied that a marriage has irretrievably broken down for just cause shall dissolve the marriage on that ground if the cause is such as is defined in:

(a) Section 13(a) on the claim of the spouse entitled to allege that cause;

(b) Section 13(a) on the claim of the spouse not entitled to allege that cause provided that the Court is further satisfied:

(i) that the conduct constituting such cause is capable of amends; and

(ii) that there is no reasonable likelihood of the spouses being reconciled after the making of such amends.

(c) Section 13(1)(b) on the claim of either spouse.

(2) A spouse shall not be entitled to allege a cause defined as just in section 13(1)(a) if to make such an allegation would be to seek to take advantage of his or her own default.

15. (1) On the dissolution of a marriage for just cause as defined in section 13(1)(a) the spouse alleging that cause shall (subject to this Act) be entitled to receive from the other such compensation as shall enable the first mentioned spouse to enjoy the same standard of living that he or she would have expected to enjoy had the marriage continued.

16. (1) On the dissolution of a marriage for just cause as defined in section 13(1)(b) or on death each spouse or his or her estate shall be subject to this Act be entitled to receive

(a) in specie or (if it cannot be identified or traced) the value of any asset he or she has brought into the marriage at its formation or as a result of a gift to him or her by a third party after its formation.

(b) half the value of the net assets which have been acquired after the formation of the marriage and before the date of the registration of the separation referred to in section 12(2) by the exertion of the spouses or either of them and which are retained or controlled by the spouses or either of them at the said date or have been disposed of before that date by one of the spouses in order to avoid the operation of this section.

(2) For the purposes of sub-section 16(1)(b) acquired assets shall include any improvement in the earning capacity of either spouse achieved after the formation of the marriage and before the said date.

(3) Payments of value pursuant to this section shall be in the form of a lump sum or the payment of periodic sums or both as to the Court shall seem fit.

(4) In determining the amount and form of such payments the Court shall

(a) avoid reducing either spouse to poverty.

(b) avoid rendering either spouse unable to continue to earn income in whatever gainful occupation he or she had previously been accustomed to follow.

(c) take account of the likelihood of the remarriage of each spouse.

(d) not derogate from the welfare of the children of the marriage.

(e) take account of the actual and potential earning capacity of each spouse.

(f) if practicable, achieve the support of a spouse for a reasonable time while he/she gains an earning capacity commensurate with that he/she had at the formation of the marriage but lost by reason of the marriage.

(5) The burden of proving that a particular asset was brought into the marriage at the time of its formation or received as a gift during the marriage by one spouse to the exclusion of the other shall lie upon the first mentioned spouse or the person claiming through him or her and any asset not proved to have been brought or received as aforesaid shall be deemed to be or to have been jointly owned by the spouses.

(6) Notwithstanding the provisions of this Act, all assets brought into the marriage and all afteracquired assets and income shall be jointly owned except insofar as:

(a) a particular asset was brought into the marriage at the time of its formation or received as a gift during the marriage or afteracquired by one spouse to the exclusion of the other, and/or

(b) the income from a particular asset or gainful occupation was received or acquired by one spouse to the exclusion of the other.

17. On dissolution of a marriage for just cause as defined in sections 13(1)(a) and 13(1)(b) of this Act all matters of custody of any unmarried children under 18 years of age shall also be decided.

18. The rights of a spouse under sections 15 and 16 hereof may be varied or modified by the terms of the contract of marriage as provided in this Act.

19. For the purposes of sections 16 and 17 poverty means the lack of and the inability to acquire as well the necessaries as the necessities of life.

20. The rules of the common law including the law of contract save in so far as they are inconsistent with the express provisions of this Act and in particular the rules relating to the law of contract and the effect of fraud misrepresentation duress or undue influence mistake or other invalidating cause shall continue to apply to contracts made in accordance with this Act.

Appendix B

Some Further Amendments to the Family Law Act and Regulations Consequent on the Adoption of the Principles of this Dissenting Report

Part III—Family Law Act—*Counselling and Reconciliation*

Repeal sub-section (1) of Section 14 and in its place insert a new sub-section (1) and (1)(A):

14. (1) Where proceedings for a dissolution of marriage have been instituted or where proceedings to vary interpret or enforce a contract of marriage have been initiated, it is the duty of the judge or magistrate constituting the court to advise of and encourage the possibility of a reconciliation of the parties.

(1)(A) Prior to the initiation of proceedings for a dissolution of a marriage or proceedings to vary interpret or enforce a contract of marriage, it is the duty of every legal practitioner representing a party to advise of and encourage the possibility of a reconciliation of the parties.

Amend Section 16 by deleting "may" where first occurring and inserting "shall".

Amend Section 17 to read:

17. The regulations shall provide for the furnishing to persons filing a separation notice under this Act and to their spouses, of documents setting out—

(a) the legal and possible social effects of the proposed proceedings (including the consequences for the children of the marriage) and

(b) the counselling and welfare facilities available within the court and elsewhere.

Consequent on this amendment to Section 17, Regulation 19 of the Regulations under the Family Law Act should be amended to provide for the supply of ALL DOCUMENTS, and not, as at present, "whatever document is applicable".

Part VII—Family Law Act—*Custody and Welfare*

Add new provisions:

1. In proceedings to determine whether a contract is void and where issue of the union are involved, a contract for the custody and welfare of the issue will be deemed and the terms of the contract will be included in the order of the court both where the parties agree to terms or where a dispute arises as the court determines.

2. (i) the welfare and custody of any child of a marriage made pursuant to this Act shall be provided for until any such unmarried child attains the age of 18 years on such terms as the contract of marriage provides for the welfare and custody of such child until such child attains any lesser age.

(ii) Where the terms of a contract of marriage have been extended in accord with sub-section (i) either party to the contract may seek leave to have such terms varied.

Regulations under the Family Law Act

Add new regulations to provide that:

(1) The standard form for the notification of the commencement of a period of separation is to contain a notice outlining the effect of Section 14 (see page 1 of this Appendix B), as well as information pertaining to the desirability of reconciliation.

(2) A duty on the Registrar shall be to inform all parties of the desirability of reconciliation.

Appendix C

Some Jurisdictional Amendments Arising from the Recommendation in this Report that the Family Court be Incorporated as the Family Division of the Federal Court of Australia

1. *Creation of the Family Division of the Federal Court*

Sec. 13(1) Federal Court of Australia Act 1976:

". . ., the Court comprises three Divisions, namely, the Industrial Division, the Family Division and the General Division . . ."

(2) Include Family Division

2. *Original Jurisdiction*

Sec. 20(1)(c) Federal Court of Australia Act 1976:

"The original jurisdiction of the Court in the Family Division shall be exercised pursuant to the Judiciary Act by a State Court exercising Federal jurisdiction. The original jurisdiction of the Court in the Family Division shall not be exercised by a judge of the Federal Court sitting as the Family Division of this Court."

Notes: 1. This amendment is to ensure that the original action is brought in a State Supreme or County Court.

2. It is considered that this amendment should not affect S.6(5) which allows a Federal Court judge to sit in more than one court. Under the proposals herein, the present Family Court Judges could become Federal Court Judges, and then sit in the Supreme Courts hearing original family matters.

3. *Appellate Jurisdiction*

Sec. 24(1)(c) Federal Court of Australia Act 1976 allows the Federal Court to act as an appellate court except where the appeal is from the Full Court of the State Supreme Court. If the original jurisdiction is exercised by the Full Court of a State Supreme Court, a case may be stated on a question of law to the High Court. An appeal may also be made to the High Court from the Family Division of the Federal Court by way of Sec. 33 Federal Court of Australia Act 1976.

4. *Transfer of Jurisdiction*

Sec. X, Family Law Act:

(1) On or after the date of commencement of this part, the jurisdiction and powers expressed by this Act to be vested in or exercisable by the Court or a Judge of the Court are, except in relation to matters in respect of which the hearing of proceedings in the Family Law Court has commenced or been completed before that date, vested in and exercisable by the Federal Court of Australia or a Judge of that Court and are exercisable in accordance with the Federal Court of Australia Act 1976.

(2) Where immediately before the date of commencement of this part, proceedings in a matter arising under this Act were pending in the Family Court of Australia but the hearing of the proceedings had not commenced—
   (a) the proceedings are, by force of this Act, transferred to the Federal Court of Australia on the date of commencement of this part;
   (b) the Federal Court of Australia may hear and determine the proceedings;
   (c) all documents filed of record in the Family Court of Australia in the proceedings shall be transmitted to the Registrar of the Federal Court of Australia;
   (d) Any monies lodged with the Family Court in relation to the proceedings shall be transmitted by the Registrar to the Federal Court of Australia and dealt with as if they had been lodged with that Court;
   (e) all things done in and in relation to the proceedings in the Family Court shall be deemed to have been done in and in relation to the proceedings in the Federal Court of Australia.

(3) The Federal Court of Australia has the same powers in respect of an order of the Family Court of Australia made under this Act, whether before or after the commencement of this Part, as if it were an order of the Federal Court of Australia.

(4) In this section, a reference to this Act shall be read as including a reference to this Act as amended after the commencement of this Part.

Appendix D

Suggested Form of Marriage Contract

THIS DEED OF COVENANT made the day of

BETWEEN

. (the Bride)

of the one part

AND

(the Groom)

of the other part

WHEREAS each of the parties has agreed to marry the other WITNESSETH that the union of the parties to be created by the celebration of their marriage shall last until:

I. death doth them part; or

II. dissolved by a Court of Law no less than two years after
   (i) the parties have parted by consent; or
   (ii) either of the parties has withdrawn from their consortium
   (iii) either of the parties (on being given just cause by the other) has withdrawn from their consortium

PROVIDED ALWAYS THAT the union shall not be dissolved on the ground of such parting or withdrawal unless ever since it occurred the parties have lived separately and apart and it shall have been registered as by law prescribed

Mandatory Provisions: AND each of the parties HEREBY COVENANTS with the other that during the continuance of the union he or she will

1. Cleave to the other to the exclusion of all others.
2. Not grieve, distress nor oppress the other but treat the other with charity, kindness and forebearance and in all things do unto the other as he or she would be done by.
3. Provide the other with comfort spiritual and material to the best of his or her ability.
4. Nurture, discipline, nourish, rear, foster, train and educate the children or the marriage so as best to develop their talents and fit them for the society of their fellow man and to collaborate with the other therein.

or

4. Use his or her best endeavours to keep the marriage childless.
5. Use his or her best endeavours and collaborate equally with the other in the keeping and provisioning of and the maintenance of good order company cheer and cookery in the matrimonial home and in particular (but without detracting from the generality of the foregoing) should one task fall solely or mainly on the other assume a correspondingly greater share of the remaining tasks.
6. Will not introduce into the matrimonial home any person or chattel to which the other shall reasonably object and will not unreasonably object to the introduction by the other into the matrimonial home of any person or chattel.
7. Will keep informed and consult with the other concerning all affairs and matters in which he or she or they are both involved whether alone or with others.

Optional Provisions: AND EACH OF THE PARTIES HEREBY AGREES with the other that during the continuance of their union

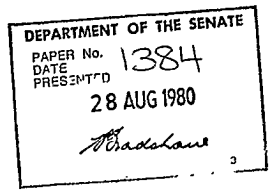
1. Their domesticities shall [primarily] be the responsibility of the [Bride or Groom or them both].
2. The provision of their income shall [primarily] be the responsibility of the [Bride or Groom or them both] and to this end [he or she or they] shall be engaged in full time gainful employment so as to make proper use of his her or their talents.
3. The management of their property shall [primarily] be the responsibility of the [Bride or Groom or them both]
4. [Unless and until there are children of the marriage] [each of them the Bride or the Groom] will continue in gainful employment and subject to preserving the consortium shall pursue the same with such application and seek therein such advancement as would have been expected had the parties not married [and to enable the Bride or Groom to continue in gainful employment the parties shall engage for the purposes of their union the paid services of: a nurse, a charlady, a cook . . .]
5. If either party for the sake of the union discontinues his or her gainful employment he or she shall on becoming free of the responsibility which caused such discontinuance be entitled to undergo at the reasonable expense of both the parties' resources such training as will enable him or her to resume his or her previous career or a reasonable substitute therefore.
6. All income derived from the gainful occupation and assets of each party shall be jointly owned: and shall be paid into a bank account in the joint names of the parties which may be drawn upon only by an order or cheque signed [by them both] and from which (after adequate provision has been made for their joint liabilities including the expenses of the household and the maintenance of the children) each of the parties shall receive an equal [monthly annual . . .] dividend for his or her own use.

   or

   but shall be managed and disposed of by the [Bride or Groom] alone who shall make adequate provision for the parties' joint liabilities (including the expenses of the household and the maintenance of the children) and from what is then left shall pay to [him or her] self and the other party an equal [monthly annual . . .] dividend for his or her own use.

   or

   each party shall own severally the income derived from his or her own gainful occupation and assets but shall in the proportion which his or her income bears to the income of the children).
7. During the continuance and after the dissolution of the marriage the care of each of the children until such child attain to the age of ..... years shall be the primary responsibility of the [Bride or Groom] and after the dissolution of the marriage each of the children until such child attains to the age of ..... shall be in the care and control of the [Bride or Groom] save for the periods set out hereunder when such child shall be in the care and control of the other party. After the dissolution of the marriage and his or her attainment to the age of ..... years each such child shall be in the care and control of whichever of the parties and for whatever periods such child shall choose.



THE PARLIAMENT OF THE COMMONWEALTH OF AUSTRALIA

FAMILY LAW IN AUSTRALIA

REPORT OF THE JOINT SELECT COMMITTEE ON THE FAMILY LAW ACT

JULY 1980

Volume Two: Appendixes

Australian Government Publishing Service
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CONTENTS

Appendix 1

EXTRACTS FROM VOTES AND PROCEEDINGS AND SENATE JOURNALS

The following extracts from House of Representatives Votes and Proceedings and from the Journals of the Senate refer to the resolution of appointment and membership of the Joint Select Committee on the Family Law Act.

FAMILY LAW ACT—JOINT SELECT COMMITTEE: The Attorney-General and Minister for Administrative Services Senator Durack, pursuant to Notice of Motion not objected to as a Formal Motion, moved—That—

(1) A Joint Select Committee be appointed to inquire into and report upon—
  (a) the provisions, and the operation, of the *Family Law Act* 1975, with particular regard to—
    (i) the ground of divorce and whether there should be other grounds;
    (ii) maintenance, property and custody proceedings including—
      (a) the bases on which orders may be made in such proceedings; and
      (b) the enforcement of orders in such proceedings;
    (iii) the organisation of the Family Court of Australia and its conduct of proceedings;
    (iv) the conduct of proceedings by State and Territory courts exercising jurisdiction under the Act;
    (v) whether the Family Court should be more open to the public when hearing proceedings, and whether publication of the details of proceedings under the Act should be permitted;
    (vi) the services provided by—
      (a) the counsellors attached to the Family Courts; and
      (b) approved voluntary marriage counselling organisations;
    (vii) the cost of proceedings under the Act; and
  (b) any other matters under the Act referred by the Attorney-General.

(2) The Committee consist of five members of the House of Representatives nominated by the Prime Minister, three members of the House of Representatives nominated by the Leader of the Opposition in the House of Representatives, three Senators nominated by the Leader of the Government in the Senate and two Senators nominated by the Leader of the Opposition in the Senate.

(3) Every nomination of a member of the Committee be notified in writing to the President of the Senate and the Speaker of the House of Representatives.

(4) The Committee elect as Chairman one of the members nominated by the Prime Minister or by the Leader of the Government in the Senate.

(5) The Committee elect a Deputy-Chairman who shall perform the duties of the Chairman of the Committee at any time when the Chairman is not present at a meeting of the Committee, and, at any time when the Chairman and Deputy-Chairman are not present at a meeting of the Committee. The members present shall elect another member to perform the duties of the Chairman at that meeting.

(6) The Committee have power to appoint sub-committees consisting of 3 or more of its members and to refer to any such sub-committee any of the matters which the Committee is empowered to examine.

(7) The Committee or any sub-committee have power to send for persons, papers and records, to move from place to place and to sit during any adjournment of the Parliament.

(8) Seven members of the Committee constitute a quorum of the Committee, and a majority of the members of a sub-committee constitute a quorum of that sub-committee.

(9) In matters of procedure the Chairman or Deputy-Chairman when acting as Chairman have a deliberative vote and, in the event of an equality of voting, have a casting vote, and, in other matters, the Chairman or Deputy-Chairman have a deliberative vote only.

(10) The Committee be provided with all necessary staff, facilities and resources.

(11) The Committee or a sub-committee have power to authorise publication of any evidence given before it and any document presented to it.

(12) The Committee report by 31 December 1979 and any member of the Committee have power to add a protest or dissent to any report.

(13) The foregoing provisions of this Resolution, so far as they are inconsistent with the Standing Orders, have effect notwithstanding anything contained in the Standing Orders.

(14) A Message be sent to the House of Representatives acquainting it of this Resolution and requesting that it concur and take action accordingly.

17 August 1978

MESSAGE FROM THE SENATE—FAMILY LAW ACT—JOINT SELECT COMMITTEE: The following message from the Senate was reported:

Message No. 131

Mr Acting Speaker,

The Senate concurs in the following modifications to the Resolution of the Senate relating to the proposed Joint Select Committee on the Family Law Act contained in Message No. 135 of the House of Representatives:

(i) Clause 1, sub-clause (a), after paragraph (i), insert the following paragraph: "(ia) its effects on the institution of marriage and the family;".

(ii) Clause 2, omit "five", substitute "six".

(iii) Clause 2, omit "three" (first occurring), substitute "four".

28 September 1978

FAMILY LAW ACT—JOINT SELECT COMMITTEE—APPOINTMENT OF MEMBERS: The President informed the Senate that, pursuant to the Resolutions agreed to by both Houses, he had received letters from the Leader of the Government in the Senate and the Leader of the Opposition in the Senate nominating Senators to be appointed members of the Joint Select Committee on the Family Law Act.

The Minister for Social Security (Senator Guilfoyle), by leave, moved—That Senators Coleman, Davidson, Melzer, Missen and Walters, having been duly nominated in accordance with the Resolution of the Senate of 17 August 1978, as varied on 28 September 1978, be appointed members of the Joint Select Committee on the Family Law Act.

28 September 1978

FAMILY LAW ACT—JOINT SELECT COMMITTEE: Mr Speaker informed the House of the following nominations of Senators and Members to be members of the Joint Select Committee on the Family Law Act:

Senators Davidson, Missen and Walters had been nominated by the Leader of the Government in the Senate and Senators Coleman and Melzer had been nominated by the Leader of the Opposition in the Senate.

Mr Cairns, Mr Falconer, Mr Katter, Mr Lusher, Mr Martyr and Mr Ruddock had been nominated by the Prime Minister and Mr Bowen, Mr J. J. Brown, Mr Holding and Mr Stewart had been nominated by the Leader of the Opposition.

12 October 1978

PARLIAMENTARY COMMITTEES—PROPOSED AMENDMENTS TO RESOLUTIONS OF APPOINTMENT: Mr Sinclair (Leader of the House), pursuant to notices Nos. 1-8, moved the following motions together, by leave:

Family Law Act–Joint Select Committee:

(1) That paragraphs (2) and (4) of the resolution of appointment of the Joint Select Committee on the Family Law Act be omitted and the following paragraphs substituted:

"(2) The committee consist of 6 Members of the House of Representatives nominated by either the Prime Minister, the Leader of the House or the Government Whip, 4 Members of the House of Representatives nominated by either the Leader of the Opposition, the Deputy Leader of the Opposition or the Opposition Whip, 3 Senators nominated by the Leader of the Government in the Senate and 2 Senators nominated by the Leader of the Opposition in the Senate.

"(4) That the committee elect as Chairman of the committee one of the members nominated by either the Prime Minister, the Leader of the House or the Government Whip or by the Leader of the Government in the Senate."

(2) That a message be sent to the Senate acquainting it of this resolution and requesting its concurrence.

22 February 1979

MESSAGES FROM THE SENATE: Messages from the Senate, dated 1 March 1979, were reported—

(a) concurring in the resolutions of the House relating to amendments to the resolutions of appointment of the Joint Committee on the Australian Capital Territory, the Joint Select Committee on the Family Law Act, the Joint Committee on Foreign Affairs and Defence and the Joint Standing Committee on the New and Permanent Parliament House—Message No. 214.

1 March 1979

FAMILY LAW ACT—JOINT SELECT COMMITTEE: Mr Speaker informed the House that the Opposition Whip had nominated Dr Blewett to be a member of the Joint Select Committee on the Family Law Act in place of Mr Stewart, deceased.

10 May 1979

FAMILY LAW ACT—JOINT SELECT COMMITTEE: Mr Ruddock (Chairman), by leave, moved—

(1) That paragraph (12) of the resolution of appointment of the Joint Select Committee on the Family Law Act be omitted and that the following paragraph be substituted:

"(12) That the Committee report by 31 May 1980 and any member of the Committee have power to add a protest or dissent to any report."

(2) That a message be sent to the Senate requesting its concurrence.

11 September 1979

MESSAGE FROM THE SENATE—FAMILY LAW ACT—JOINT SELECT COMMITTEE: The following message from the Senate was reported:

Message No. 299

Mr Speaker,

The Senate, having considered Message No. 325 of the House of Representatives relating to the Joint Select Committee on the Family Law Act, has agreed to the following Resolution in connection therewith, viz.:

That the Senate concurs in the Resolution of the House of Representatives contained in Message No. 325 of the House of Representatives.

12 September 1979

FAMILY LAW ACT—JOINT SELECT COMMITTEE—*Message from the House of Representatives:* The following Message from the House of Representatives was reported:

Message No. 505

Mr President,

The House of Representatives transmits to the Senate the following Resolution which was

agreed to by the House of Representatives this day and requests the concurrence of the Senate therein:

That paragraph (12) of the resolution of appointment of the Joint Committee on the Family Law Act be omitted and that the following paragraph be substituted:

"(12) The Committee report by 31 August 1980 and any member of the Committee have power to add a protest or dissent to any report."

15 May 1980

Appendix 2

LIST OF SUBMISSIONS AUTHORISED FOR PUBLICATION

Published Submissions Transcript Vol. 1

Aboud, Mr D.
Association of Civil Marriage Celebrants
Attorney-General's Department (Commonwealth)
Attorney-General for Western Australia
Australian Council of Social Services
Australian Federation of Business and Professional Women
Bartley, Mr R. J.
Blom, Mrs B.
Catholic Welfare Bureau
Charlesworth, Ms S.
Church of England Marriage Guidance Centre
Citizen's Welfare Service of Victoria
Commissioner for Community Relations
Commissioner of Police (Tasmania)
Council of Social Services (N.S.W.)
Defence Against Women's Maintenance and Alimony
De Lacy, Ms E.
Divorce Law Reform Association of South Australia
Evangelical Alliance of Western Australia
Fereday, Dr M.
Foreman, Ms L.
Goodman, Ms E.
Ilbery, Bartlett & O'Dea, Solicitors
Institute of Psychologists
Kovacs, Ms D.
Lamborn, Mr M. J.
Lashchuk, Mr K. M.
Marriage Education Institute
Marriage Guidance Council of New South Wales
Marriage Guidance Council of South Australia
Marriage Guidance Council of Western Australia
Mason, Mr P. M.
National Aboriginal Conference
National Council of Women in Australia
National Marriage Guidance Council
New South Wales Council of Churches
New South Wales Women's Advisory Council to the Premier
Ozdowski, Mr S. A.
Parents Without Partners (Queensland)
Paul, Mr M. A.
Queensland Divorce Law Reform Association

Sikk, Mr E.
South Sydney Community Aid Co-operative
Swensen, Mr G.
Syrotynsky, Mr R. V.
Tasmanian Aboriginal Centre
Turner, Mr Neville
University of Sydney, Law Faculty
W.E.L (Australia)
W.E.L. (Tasmania)
Women's Action Alliance
Women in Transition

Published Submissions Transcript Vol. 2

Action for Children
Army of Men and Women
Australian Association of Marriage and Family Counsellors
Australian Federation of Women Voters
Bales, Mr J. H.
Catholic Women's League of Australia
Centacare (Perth) and Catholic Women's League
Council of Churches in N.S.W.
Department of Foreign Affairs
Department of Immigration and Ethnic Affairs
Department of Social Security
Department of Employment and Youth Affairs, Women's Bureau
Mrs G. Ewens
Family Foundation of Victoria and Family Foundation (S.A.) Inc
Feminist Legal Action Group
Family Life Education in N.S.W.
Festival of Light
Gay Task Force
Goodman, Mrs E.
Harvey, Mr L. V.
Healey, Mr B. J.
Legal Services Commission of S.A.
Liberal Party of W.A.—Forrest Division
Liberal Party of Australia—W.A. Women's Council
Law Council of Australia
Lone Fathers Association of Victoria
Lone Fathers Association of Australia—Outer Western region
Lone Parent Federation—N.S.W.
Manly Warringah Women's Resource Centre
Nance, G.
Nygh, Professor P. E.
N.S.W. Labor Women's Committee
Parents Without Partners (Victoria)
Parents Without Partners (Aust.) Inc.
Parents Without Rights
Portway, Mr C.
Regular Defence Forces Welfare Association
Religious Society of Friends (Quakers)

Sharah, Dr A.
Social Responsibilities Commission of the C of E
South Australian Government
Springvale Legal Service Co-op. Ltd.
Supporting Mothers Association of W.A.
Union of Australian Women
V.C.O.S.S.
Victorian Women's Refuges Group
W.E.L. Cairns
W.E.L. Western Australia
Wilson, Mr A. W.
Wollongong and District Law Society
Women and Children's Emergency Hostel, Pt. Augusta
Women's Action Alliance of Western Australia
Women's Hospital (Crown Street)
ZONTA Club, Hobart
Catholic Women's League, N.S.W.

Published Submissions Transcript Vol. 3

Australian Family Action Movement
Family Life Movement of Australia
Family Life Movement of New South Wales
Young Liberal Movement of Australia
Family Law Practitioners Association of New South Wales
Australian Catholic Social Welfare Commission
Ms S. Arnold of the 'Sun' newspaper
Law Consumers Association
Family Foundation of Victoria and South Australia
Springvale Legal Service Co-operative
Supporting Mothers Association of Victoria
Catholic Women's League of Victoria, South Australia and Western Australia
Fitzroy Legal Service
Knights of the Southern Cross
Uniting Church of Australia
Queensland Law Society
Tasmanian Marriage Guidance Council
Catholic Women's League of Australia
Liberal Party of Australia Women's Council
Australian Association of Marriage and Family Counsellors
Family Court of Western Australia
National Women's Advisory Council
Department of Home Affairs
Australian Legal Aid Office
South Australian Liberal Party Women's Council
Law Society of South Australia

Published Submissions Transcript Vol. 4

Attorney-General of Victoria
Bales, J. H.
Buckle, Dr L.
Byrne, Mrs E.
Church of England Social Questions Committee
Department of Aboriginal Affairs
Exclusive Brethren
Family Court Judges
Festival of Light and Community Standards Organisation (South Australia) Inc.
Gee, R. W.
Hambly, Professor D.
Isbister, Dr C.
Kennett, K.
Lawson, R. A. & Co.
McGarvin, J. E.
O'Connor, Ms P.
Parents Without Partners
Perth Asian Community Centre
Ranken, Mr A. B.
Ruggero, J. M.
Shepherd, B.
Springvale Community Aid and Advice Bureau
Supporting Mothers Association of Victoria
Women's Action Alliance (Victoria)

Published Submissions Transcript Vol. 5

Defence Against Women's Maintenance & Alimony
Western Australian Labor Women's Organisation
Law Consumers Association
Department of Finance
Mr G. D. Goldberg
Maloney, Milne & Salier (Solicitors & Conveyancers)
Senator J. Knight
Mr A. Lansdown
Mr J. D. Lloyd
Mr A. Provan
Parents Without Partners (NSW)
Law Society of the Northern Territory
Rt. Rev. P. Chiswell (Bishop of Armidale)
Lutheran Church of Australia (S.A. District Inc)
Apex Club of Orbost
Dr R. Higgs
His Eminence Sir James Cardinal Freeman
Mr M. Morley Q.C.
IYC National Committee on Non-Governmental Organisations
Maurice Kelly & Goodman (Solicitors)
Commissioner of the Commonwealth Police
Bethesda Christian Centre
Women's Welfare Issues Consultative Committee

Catholic Family Welfare Bureau, Victoria
Mr R. J. Quinn (Solicitor)
Inter-Church Trade and Industry Mission (NSW)
Canterbury Community Aid Bureau
New South Wales Attorney-General
Dr Kevin Grey

PARLIAMENT OF AUSTRALIA

JOINT SELECT COMMITTEE ON THE FAMILY LAW ACT

Witnesses to the Inquiry

Name	Title/Address	Place and Date of Hearing	Page Number/ Transcript.
ANDREWS, E. J.	Principal Legal Officer, Family Law Section, Australian Legal Aid Office, Sydney	A.C.T. 12.10.79	6464-6481
ARMSTRONG, S.	Director, Legal Services Commission of South Australia	Adelaide 24.4.79	3480-3523
ARNOLD, J. S.	Journalist 'Sun' Newspaper, Sydney	Sydney 4.7.79	5411-5429
ASCHE, Mr Justice K.J.A.	Member, Family Law Council	A.C.T. 7.12.78	1-106
BAIN, T.	Collective Member Hobart Women's Shelter, Tasmania	Hobart 16.5.79	3898-3938
BARBLETT, Mr Justice A. J.	Member, Family Law Council	A.C.T. 7.12.78	1-106
	Chairman of Judges, Family Court of Western Australia	Perth 10.4.79	2924-3003
BARNES, S.	Council Member, Action for Children Sydney, N.S.W.	Sydney 4.7.79	5429-5453
BARTLEY, R. J.	Stipendiary Magistrate, Metropolitan Children's Court, Sydney N.S.W.	Sydney 13.3.79	1178-1215
BATES, F. A.	Lecturer in Law, University of Tasmania	Hobart 16.5.79	4103-4059
BEATTIE, M. H.	Member, Women's Action Alliance, Hobart	Hobart 16.5.79	3938-3983
BENZ, P.	Assistant Director, Marriage Guidance Council of Tasmania	Hobart 15.5.79	3850-3873
BERMINGHAM, I. H.	Chief Psychologist, Mental Health Branch, Capital Territory Health Commission,	A.C.T. 8.2.79	108-177
BIRCH, R.	Executive Officer National Aboriginal Conference Secretariat A.C.T.	A.C.T 22.5.79	4062-4102
BISHOP, S. R.	Legal Officer, Legal Services Commission of South Australia, Adelaide	Adelaide 24.4.79	3480-3523
BLANK, L.	Executive Member, Marriage Guidance Council of Western Australia Inc.	Perth 9.4.79	2795-2820
BLOM, E.	Deakin A.C.T.	A.C.T. 23.3.79	1895-1915
BOOKER, L.	President Australian Federation of Women Voters, Castle Cove N.S.W.	Sydney 4.7.79	5453-5467
BOTHMANN, S.	Administrator, Fitzroy Legal Service, Victoria	Melbourne 25.6.79	4421-4481
BOWLER, G. J.	Acting Chief of Welfare Services, Department for Community Welfare (W.A.)	Perth 9.4.79	2850-2882
	Director of Court Counselling, Family Court of Western Australia	Perth 10.4.79	2924-3003

BRASIER, Father J.	Executive Director Catholic Family Welfare Bureau, North Carlton, Victoria.	Melbourne 25.6.79	4481-4505
BROWN, I. P.	Senior Education Officer, Education Department, Adelaide	Adelaide 23.4.79	3088-3192
BROUN, M. D.	President, Family Law Practitioners' Association of N.S.W.	Sydney 4.7.79	5496-5550
BRYCE, Q. A. L.	Member, National Womens Advisory Council, Canberra	A.C.T. 12.10.79	6416-6446
BUCKLE, Dr L. G.	Psychotherapist, Kew, Victoria	Melbourne 27.6.79	5071-5098
BUCKLEY, N, J.	Member, Family Law Council	A.C.T. 7.12.78	1-106
	Member, Family Law Advisory Committee, Law Council of Australia	Melbourne 2.4.79	1920-1977
	Member, Family Law Advisory Committee, Law Council of Australia	Sydney 30.4.79	3544-3626
BULL, M. K.	President, Action for Children, Epping N.S.W.	Sydney 4.7.79	5429-5453
BURNARD, Father D.	Director, Marriage Education Institute, Melbourne, Victoria	Melbourne 26.6.79	4548-4583
BURR, R. K.	Chairman, Family Law Committee, Law Society of South Australia	Adelaide 23.4.79	3230-3284
BYRNE, E.	Social Worker, Sydney New South Wales	A.C.T. 14.9.79	6012-6034
CANAVAN, M. J.	Member, Parents without Partners (Australia) Inc.	Brisbane 24.9.79	6213-6231
CAREY, J. X.	Research Officer, Young Liberal Movement of Australia, Sydney N.S.W	Sydney 3.7.79	5269-5294
CARNSEW, J. L. M.	Assistant Secretary, Special Services Branch Attorney-General's Department, Canberra	A.C.T. 9.2.79	974-1021
CARTER, S.	Executive Officer, Queensland Law Society	Brisbane 24.9.79	6291-6303
CHAPMAN, Sister P.	Social Worker, Centacare, Hobart	Hobart 15.5.79	3715-3763
CHARLESWORTH, S. O.	Department of Social Studies, University of Melbourne, Vic.	Melbourne 3.4.79	2222-2265
CHOATE, J. A.	State Director, Marriage Guidance Council of Tasmania	Hobart 15.5.79	3850-3873
CLAYTON, Dr G. M.	Director, Wesley Centre, Mount Lawley, W.A.	Perth 9.4.79	2901-2922
CLEAVER, R.	Chairman, Western Australian Branch of the Association of Civil Celebrants of Australia	Perth 9.4.79	2882-2901
COLEMAN, L. G.	Research Officer, Family Foundation of Victoria	Melbourne 2.4.79	1977-2031
CONDOLEON, N. E.	Acting Assistant Secretary, Australian Government Retirement Benefits Office, Department of Finance	A.C.T. 12.10.79	6306-6359
COOMBS, J. V.	Legal Committee Member, Australian Festival of Light, Sydney	Sydney 4.7.79	5334-5411
COSGRAVE, J.	Secretary, Family Foundation of Victoria	Melbourne 2.4.79	1977-2031
CRAWFORD, B. H.	Member, Family Law Advisory Committee, Law Council of Australia	Melbourne 2.4.79	1920-1977
	Member, Family Law Advisory Committee, Law Council of Australia	Sydney 30.4.79	3544-3626
	President, Family Law Practitioners' Assoc. of Tasmania	Hobart 15.5.79	3763-3810
CRESWELL, C. C.	Member, Family Law Council	A.C.T. 7.12.78	1-106
	Senior Assistant Secretary, Family Law Branch, Attorney-General's Department, Canberra	A.C.T. 8.2.79	177-304
CROWE, M.	Treasurer Family Foundation of Victoria,	Melbourne 2.4.79	1977-2031

CROYDON, R. L.	Australian Board Member and Joint State Convenor of Laws, National Council of Women of Australia, Adelaide.	Adelaide 24.4.79	3306-3357
DAKIN, E. G.	Acting Chief Superintendent, Tasmania Police, Hobart	Hobart 16.5.79	3876-3898
DAVIES, C. F.	Chairman, Family Law Advisory Committee, Law Council of Australia	Melbourne 2.4.79	1920-1977
	Chairman, Family Law Advisory Committee, Law Council of Australia	Sydney 30.4.79	3544-3626
DAVIS R. M.	Registrar, Family Court of Western Australia	Perth 10.4.79	2924-3003
DAVOREN, Father J. F.	Secretary, Australian Catholic Social Welfare Commission, Sydney N.S.W.	Sydney 3.7.79	5221-5269
De LACY, E. A.	Lecturer in Psychology, Mount Gravatt College of Advanced Education, Queensland	Brisbane 24.9.79	6066-6086
DAVEY, M.	President, National Council of Women of Australia, South Australia	Adelaide 24.4.79	3306-3357
DeZWART, M.	Member, South Australian Health Education Project Team, Education Department, Adelaide	Adelaide 23.4.79	3088-3192
DOWD, J. M.L.A	Parliament House, Macquarie Street, Sydney	Sydney 6.7.79	5838-5867
DOWNEY, C. M.	President, Catholic Women's League, Mount Lawley, W.A.	Perth 9.4.79	2720-2746
DOWNIE, C. A.	Collective Member, Hobart Women's Shelter	Hobart 16.5.79	3898-3938
DOWNS, R. D.	President, Queensland Divorce Law Reform Association, Brisbane	Brisbane 24.9.79	6086-6134
DOYLE, R. J.	Welfare Rights Officer, Lone Parent Federation and Lone Fathers Association of Australia (Outer Western Region), N.S.W.	Sydney 3.7.79	5100-5133
DUFFY, R. M.	Member, Family Law Committee, Law Society of S.A.	Adelaide 23.4.79	3230-3284
DWYER, M. G.	Director, Marriage Grants and Estates Section, Special Services Branch, Attorney-General's Department, Canberra	A.C.T. 9.2.79	974-1021
DWYER, W. A.	Member National Community Relations Committee Knights of the Southern Cross, Vic	Melbourne 27.6.80	5034-5054
EDDY, E.	Victorian Women's Refuges Group	Melbourne 2.4.79	2031-2077
ELLIS, J. B.	Project Officer, Department for Community Development, Adelaide	Adelaide 23.4.79	3088-3192
EVATT, Justice E. A.	Chairman, Family Law Council	A.C.T. 7.12.78	1-106
	Chief Judge, Family Court of Australia, Sydney	Sydney 5.7.79	5552-5729
	Chief Judge, Family Court of Australia, Sydney	Sydney 6.7.79	5732-5837
	Chief Judge, Family Court of Australia, Sydney	A.C.T. 29.11.79	5887-5917 6778-6907
EWENS, G.	Convenor, Equalisation of Benefits Action Group of Concerned Women, A.C.T.	A.C.T. 23.3.79	1866-1895
FEREDAY, Dr M.	Child Psychiatrist, Adelaide S.A.	Adelaide 23.4.79	3192-3230
FINLAY, Prof. H. A.	Associate Professor, Faculty of Law, Monash University, Victoria	Melbourne 2.4.79	2105-2220
FOOKS, P. O.	Member, Exclusive Brethren, N.S.W.	A.C.T. 14.9.79	6034-6063
FOREMAN, L. E.	Lecturer, University of Melbourne Criminology Department, Victoria.	Melbourne 25.6.79	4528-4546
FORBES, A. A.	Member, Family Law Committee, Law Society of South Australia	Adelaide 23.4.79	3230-3284
FREAK, R. J.	Deputy Director (Education), Marriage Guidance Council of South Australia	Adelaide 24.4.79	3523-3541

FOULSHAM, J. M.	Legal Officer, Department for Community Welfare, Western Australia	Perth 9.4.79	2850-2882
FOWLER, S. G.	Member, Family Law Advisory Committee, Law Council of Australia	Sydney 30.4.79	3544-3626
FOX, A. W.	Worker, Hobart Women's Shelter, Tasmania	Hobart 16.5.79	3898-3938
GAUNT, K. M.	President, Army of Men and Women Perth, W.A.	Perth 9.4.79	2746-2777
GEE, R. W.	Barrister-at-Law, Selborne Chambers, 174 Phillip St. Sydney	Sydney 3.7.79	5294-5331
GILES, P. J.	Labor Women's Organisation, Perth, W.A.	Perth 11.4.79	3059-3083
GOLDBERG, G. D. M.	Solicitor, East Melbourne, Vic.	Melbourne 22.6.79	4505-4528
GOODE, J. M.	Australian and Joint State Convenor, Standing Committee on Laws and Sufferage National Council of Women of Australia, S.A.	Adelaide 24.4.79	3306-3357
GOODMAN, E. M.	Lecturer in Law, Macquarie University, N.S.W.	Sydney 6.7.79	5868-5886
GORDON/CLARK, F. H.	Deputy Chairman, Church of England Social Questions Committee, (Diocese of Melbourne)	Melbourne 26.6.79	4655-4693
GORTON, P. N.	Deputy Director, Department for Community Welfare, Western Australia	Perth 9.4.79	2850-2882
GOWARD, A. J.	First Assistant Secretary, Department of Immigration and Ethnic Affairs, Canberra	A.C.T. 23.3.79	1826-1866
GRAHAM, D.	Co-convenor, Family Law Action Group, Women's Electoral Lobby, Sydney	Sydney 13.3.79	1108-1178
GRASSBY, Hon. A. J.	Commissioner for Community Relations, Canberra	A.C.T, 12.10.79	6393-6416
HANKS, E. E.	Representative, Western Australian Branch of the Association of Civil Celebrants of Australia, Perth	Perth 9.4.79	2882-2901
HARVEY, L. V.	Director, Psychology & Counselling Section Special Services Branch, Attorney-General's Department, Canberra	A.C.T. 9.2.79	974-1021
	Psychologist, Canberra	A.C.T. 14.9.79	5920-5968
HEALEY, B. J.	Consultant Clinical Psychologist, Vic.	Melbourne 2.4.79	2077-2105
HEFFERNAN, P. A. R.	Committee Member, Parent without Rights, Cheltenham Vic.	Melbourne 27.6.79	4951-5034
HICKEY, Father B.	Director, Centacare, Perth, W.A.	Perth 9.4.79	2720-2746
HOGG, M. M. J.	Solicitor, Fitzroy Legal Service, Vic.	Melbourne 25.6.79	4421-4481
HOLLAND, B. E.	Liaison Officer, Law Consumers Association, 62 Alfred Street, Milsons Point, N.S.W.	Sydney 3.7.79	5133-5184 5210-5220
HUNT, P.	Chief Finance Officer, Department of Finance, Canberra	A.C.T 12.10.79	6306-6359
ISBISTER, Dr J. S.	Committee Member, Women's Action Alliance (NSW) Sydney	Sydney 30.4.79	3663-3712
JARDINE, J. C.	Acting Class 8 Clerk, Constitutional Section, Department of Aboriginal Affairs	A.C.T. 22.5.79	4102-4130
JESSEP, O. D.	Member, Family Law Sub-Committee, Australian Council of Social Services	A.C.T. 9.2.79	1021-1075
JOHNSTON, W. P.	Principal Legal Officer, Family Law Branch, Attorney-General's Department, Canberra	A.C.T. 8.2.79	177-304
JOYCE, R. R.	Representative, Labor Women's Organisation, W.A.	Perth 11.4.79	3059-3083
KALNINS, A.	Senior Family Maintenance Officer, Department of Community Welfare, S.A.	Adelaide 23.4.79	3088-3192
KELLY, D. M.	Vice-President, Women's Action Alliance, of Tasmania	Hobart, 16.5.79	3938-3983

KENNEDY, R. M	Member, Gay Task Force, N.S.W.	A.C.T. 14.9.79	5968-6012
KIDDLE, W. G.	Assistant Secretary, Department of Immigration and Ethnic Affairs, Canberra	A.C.T 23.3.79	1826-1866
KILBY, Father C.	Director, Centacare, Catholic Family Welfare, Hobart	Hobart, 15.5.79	3715-3763
	Executive Member, Australian Catholic Social Welfare Commission, Sydney	Sydney 3.7.79	5221-5269
KNOX, B.	Member, Family Law Practitioners' Assoc. of Tasmania	Hobart 15.5.79	3763-3810
KOUTSOUNADIS, V.	Social Worker, South Sydney Community Aid Co-operative Limited, N.S.W.	Parramatta 14.3.79	1752-1780
KOVACS, D.	Chief Examiner in Family Law, Monash University, Clayton, Vic.	Melbourne 26.6.79	4724-4849
LANE, M.	Member, Family Law Council	A.C.T 7.12.78	1-106
LASHCHUK, Dr. K. M.	Child Psychiatrist, Clapham, S.A.	Adelaide 23.4.79	3192-3230
LETT, S. F.	Committee Member, Victorian Council of Social Services,	Melbourne 3.4.79	2265-2302
LEWIS, I. J.	Regional Director, Department of Community Welfare, Adelaide	Adelaide 23.4.79	3088-3192
LEWIS, S. R.	Assistant Secretary, Department of Immigration and Ethnic Affairs, Canberra	A.C.T. 23.3.79	1826-1866
LEY, J. F.	Principal Legal Officer, Australian Legal Aid Office, Sydney N.S.W.	A.C.T. 12.10.79	6464-6481
LINDQUIST, G. V.	Nominating Authority under Marriage Act of New South Wales, Exclusive Brethren,	A.C.T. 14.9.79	6034-6063
LODER, K. E.	Member, Women's Advisory Committee to the Premier of New South Wales	Parramatta 14.3.79	1712-1752
LONERGAN, J.	Executive Member, Women's Action Alliance (NSW)	Sydney 30.4.79	3663-3712
MACKIE, Rev. I. J.	Vice President, Australian Association of Marriage and Family Counsellors, W.A	Perth 11.4.79	3039-3059
MALLAM, G. G.	Member, Board of Social Responsibility, Uniting Church of Australia, Sydney N.S.W.	Sydney 3.7.79	5185-5209
MALONEY, Dr M. J.	Convenor, Mental Health Branch A.C.T. Health Commission	A.C.T. 8.2.79	108-177
MARGAIN, Dr V. T.	National New South Wales Chairman, Australian Festival of Light	Sydney 4.7.79	5334-5411
MATTHEWS, M.	Victorian Women's Refuges Group	Melbourne 2.4.79	2031-2077
MAWSON, I.	Chairman of Directors, Springvale Legal Service Co-operative Limited, Victoria	Melbourne 26.6.79	4583-4620
MEDCALF, Hon. I. G.	Attorney-General of Western Australia	Perth 11.4.79	3005-3039
MEEHAN, S. M.	Director of Programs and Education, Parents Without Partners (Aust) Inc. Queensland Bch.	Brisbane 24.9.79	6213-6231
MIDDLETON, P.	Social Worker, Centacare, Hobart	Hobart 15.5.79	3715-3763
MITCHELL, M. V.	Administrative Director, Springvale Community Aid and Advice Bureau, Vic.	Melbourne 26.6.79	4583-4620
MORGAN, Dr V. T.	National Chairman, Australian Festival of Light, Sydney	Sydney 4.7.79	5334-5411
MORLEY, M. G.	Barrister-at-Law, Kenmore Qld.	Brisbane 24.9.79	6231-6291
MORRIS, M. H.	President, Women's Council, Liberal Party of South Australia	Adelaide 23.4.79	3284-3303
MORRISON, J.	Member, Australian Association of Social Workers (Qld).	Brisbane 24.9.79	6134-6167
MONESTER, A.	Vice Chairman, Family Law Advisory Committee, Law Council of Australia	Melbourne 2.4.79	1920-1977
MULLIGHAN, E. P.	President, Family Law Committee, Law Society of South Australia	Adelaide 23.4.79	3230-3284

MULLIN, M. J.	Vice President, Australian Federation of Women Voters	Sydney 4.7.79	5453-5467
MURPHY, G. A.	President, Queensland Law Society Inc.	Brisbane 24.9.79	6291-6303
MUSHIN, Dr D. N.	Child Psychiatrist, Mental Health Division, Department of Health, Victoria	Melbourne, 26.6.79	4620-4655
McCARTHY, H.	Honorary Secretary, Australian Association of Marriage and Family Counsellors, W.A.	Perth 11.4.79	3039-3059
McCLINTOCK, J.	Program Co-ordinator, Australian Council of Social Services, Sydney	A.C.T. 9.2.79	1021-1075
McCONNELL, J.	Member, National Women's Advisory Council, Canberra	A.C.T. 12.10.79	6416-6446
McDERMOTT R.	Director, Marriage Guidance Council of Western Australian Inc., W.A.	Perth 9.4.79	2795-2820
McKAY, J.	Director, Policy (General Section), Department of Social Security, Canberra	A.C.T. 23.3.79	1782-1826
McKENZIE, D. J.	Principal Director of Court Counselling, Family Court of Australia, Sydney	Sydney 5.7.79	5552-5729
	Principal Director of Court Counselling, Family Court of Australia, Sydney	Sydney 6.7.79	5732-5837 5887-5917
	Principal Director of Court Counselling, Family Court of Australia, Sydney	A.C.T. 29.11.79	6778-6907
McMAHON, B. D.	Representative, Women's Information Switchboard, Adelaide, S.A	Adelaide 24.4.79	3357-3464
McPHERSON, C. W.	Acting Assistant Secretary, Department of Immigration and Ethnic Affairs, Canberra	A.C.T. 23.3.79	1826-1866
NESTDALE, R.	Federal Vice-President and New South Wales State President, Young Liberal Movement of Australia, 234 George Street, Sydney N.S.W.	Sydney 3.7.79	5269-5294
NILE, Rev. F. J.	National Co-ordinator, Australian Festival of Light, Sydney	Sydney 4.7.79	5334-5411
NIMMO, Mr Justice Sir John	Judge of the Federal Court and Deputy Chairman of Administrative Appeals Tribunal Canberra	A.C.T. 29.11.79	6744-6778
NIXON, K. J.	Principal Registrar, Family Court of Australia, Sydney N.S.W.	Sydney 5.7.79	5552-5729
	Principal Registrar, Family Court of Australia, Sydney N.S.W.	Sydney 6.7.79	5732-5837 5887-5917
	Principal Registrar, Family Court of Australia, Sydney N.S.W.	A.C.T. 29.11.79	6978-6907
NYLAND, M. J.	Deputy Chairman, Family Law Committee, Law Society of South Australia	Adelaide 23.4.79	3230-3284
O'CONNOR, P. A.	Victorian Council of Social Services	Melbourne 3.4.79	2265-2302
O'CONNOR, P.	Solicitor, Fitzroy Legal Service, Vic.	Melbourne 25.6.79	4421-4481
O'GRADY, R. A.	Member, Management Committee, Port Augusta Women's and Children's Emergency Hostel, S.A.	Adelaide 24.4.79	3357-3464
OZDOWSKI, S.A.	Projects Director, Department of Sociology, University of New England, Armidale, NSW	Sydney 30.4.79	3626-3663
PARGITER, Dr R. A.	Member, Family Law Council	A.C.T. 7.12.78	1-106
	Consultant Psychiatrist, Hobart, Tas.	Hobart 16.5.79	3983-4013
PEIRCE, J. B.	Legal Adviser, Parent without Rights, East Melbourne	Melbourne 26.6.79	4951-5034
PETERSON, Dr B. H.	Member, Family Life Movement of New South Wales	Sydney 4.7.79	5467-5496
PETRE, C.	Member, Family Law Council	A.C.T. 7.12.78	1-106
	Social Worker, Redfern Legal Centre, Sydney N.S.W.	A.C.T. 9.2.79	1021-1075

PINCUS, G.	Senior Advisor, Office of Women's Affairs, Department of Home Affairs, Canberra	A.C.T. 12.10.79	6359-6393
PHELAN, J. B.	Convenor, Legal Affairs Committee, for National Marriage Guidance Council of Australia	A.C.T. 9.2.79	1075-1103
PHILLIPS, Dr D. M.	Chairman, South Australian Branch, Festival of Light	Sydney 4.7.79	5334-5411
PHILLIPS, L. G.	Secretary, National Marriage Guidance Council of Australia	A.C.T. 9.2.79	1075-1103
PLAISTER, R. D.	Member, Gay Task Force, N.S.W.	A.C.T. 14.9.79	5968-6012
PLUMMER, R.	Director, Department of Children's Services Queensland	Brisbane 24.9.79	6167-6213
POPPLETON, A.	Victorian Women's Refuges Group	Melbourne 2.4.79	2031-2077
POWER, J. E.	Association of Women and Children in Transition, Fitzroy Vic.	Melbourne 27.6.79	4905-4951
PRENDERGAST, W.	Family Law Council,	A.C.T. 7.12.78	1-106
PROWSE, I.	First Assistant Director-General, Department of Social Security, Canberra.	A.C.T. 23.3.79	1782-1826
RAPPEPORT, L.	Chairman, Marriage Guidance Council of Western Australia Inc.	Perth 9.4.79	2795-2820
REVELMAN, M. J.	President, Defence Against Women's Maintenance and Alimony, Brighton, Vic.	Melbourne 27.6.79	4852-4905
ROBERTSON, M. A.	Acting Assistant Secretary, Retirement Benefits Branch, Department of Finance	A.C.T. 12.10.79	6306-6359
ROBSON, J.	Federal Director, Family Life Movement of Australia, N.S.W.	Sydney 4.7.79	5467-5496
ROMEYKO, G.	President, Divorce Law Reform Association of South Australia	Adelaide 24.4.79	3357-3464
SANTAMARIA, Dr J. N.	Assistant Secretary, Family Foundation of Victoria	Melbourne 2.4.79	1977-2031
SCUTT, J. A.	Co-convenor, Family Law Action Group, Women's Electoral Lobby, Sydney	Sydney 13.3.79	1108-1178
SHARP, J. W.	Inspector in Charge, Northern Division of the A.C.T. Commonwealth Police,	A.C.T. 12.10.79	6446-6464
SHARPE, E. E. A.	Executive Director, Citizen's Welfare Services of Victoria	Melbourne 27.6.79	5054-5071
SIKK, E.	Spokesman for the Tasmanian Stipendiary Magistrates.	Hobart 15.5.79	3810-3850
SLATTERY, D. S.	President, Parent Without Rights, Mount Waverly, Vic.	Melbourne 27.6.79	4951-5034
SLATTERY, M.	Chairman, Women's Action Alliance (NSW)	Sydney 30.4.79	3663-3712
SMILEY, G. W.	Vice-president, Australian Association of Social Workers, (Qld),	Brisbane 24.9.79	6134-6167
SMITH, P. J.	Acting Deputy Director, Counselling Div. Marriage Guidance Council of South Australia	Adelaide 24.4.79	3523-3541
SMITH, S.	Co-ordinator and Director, Springvale Legal Service Co-operative Limited, Vic.	Melbourne 26.6.79	4583-4620
SMYTH, E. M.	Member, Women's Action Alliance, Mount Stuart, Tasmania	Hobart 16.5.79	3938-3983
SPALDING, B. R.	Executive Director, Victorian Council of Social Services,	Melbourne 3.4.79	2265-2302
SOMERS, P. A.	Acting First Assistant Secretary, Policy Div. 2 Department of Aboriginal Affairs, Canberra	A.C.T. 22.5.79	4102-4130
SORENSEN, K. A.	Spokesperson, Lone Parent Federation and the Lone Father's Association of Australia (Outer Western Region)	Sydney 3.7.79	5100-5133
STEVENSON, Rev. E.	Member, Board of Social Responsibility, Uniting Church of Australia, Sydney N.S.W.	Sydney 3.7.79	5185-5209
STRATMANN, P. M.	Legal Officer, Legal Services Commission of South Australia	Adelaide 24.4.79	3480-3523

STREET, F. V.	Member, National Community Relations Committee, Knights of the Southern Cross, Vic.	Melbourne 27.6.79	5034-5054
STREET, P. D.	Clerk of Courts, State Law Dept Vic.	Melbourne 25.6.79	4394-4421
STORER, H. G.	Vice-President, Women's Council, Liberal Party of South Australia,	Adelaide 23.4.79	3284-3303
SVENSSON, Dr U. S. M.	Victorian Women's Refuges Group	Melbourne 2.4.79	2031-2077
SWENSEN, G. J.	Social Worker, Nedlands W.A.	Perth 9.4.79	2820-2850
TARR, W. G.	Collector of Maintenance, Family Court of Western Australia	Perth 10.4.79	2924-3003
THOMSON, J. F.	Assistant Director and Officer in Charge Australian Legal Aid Office	A.C.T. 12.10.79	6464-6481
TURNER, C. J.	Vice-President, Family Law Practitioners' Association of Tasmania,	Hobart, 15.5.79	3763-3810
TURNER, J. N.	Senior Lecturer in Law, Monash University, Vic.	Melbourne 26.6.79	4693-4723
TURNER, P. A.	Acting Class 8 Clerk, Social Policy Section Department of Aboriginal Affairs, Canberra	A.C.T. 22.5.79	4102-4130
UPTON, J. A.	Senior Social Worker, Capital Territory Health Commission	A.C.T. 8.2.79	108-177
VANSTONE, A. E.	Women's Council, Liberal Party of Australia, South Australia	Adelaide 23.4.79	3284-3303
VAUGHAN, Hon. G. MLC	National President, Australian Association of Social Workers, Nedlands, W.A.	Perth 9.4.79	2777-2795
VERRALL, P. A.	Information Officer, Women's Information Switchboard, S.A.	Adelaide 24.4.79	3357-3464
WADE, J. H.	Lecturer in Family Law, Sydney University	Sydney 13.3.79	1215-1284
WALSH, J. A.	Senior Co-ordination Officer, Premiers Dept. Adelaide S.A.	Adelaide 23.4.79	3088-3192
WALTERS, R. G.	Member, Queensland Law Society Inc.	Brisbane 24.9.79	6291-6303
WARDLE, C.	Housing Officer, Springvale Community Aid and Advice Bureau, Springvale, Vic.	Melbourne 26.6.79	4583-4620
WARREN, M. L.	Legal Officer, State Law Dept. Vic.	Melbourne 25.6.79	4394-4421
WATT, A. J.	Assistant Commissioner—Operations Commonwealth Police.	A.C.T. 12.10.79	6446-6464
WILCZEK, J. R.	Member, Family Law Advisory Committee, Law Council of Australia, Sydney	Sydney 30.4.79	3544-3626
WILKS, G. J.	Executive Director, Marriage Guidance Council of South Australia	Adelaide 24.4.79	3523-3541
WILSON, Rev. T. A.	Assistant Director, Wasley Centre, Mt Lawley, W.A.	Perth 9.4.79	2901-2922
WISDOM, S. K.	Director, Social Policy Section, Policy Branch, Department of Aboriginal Affairs Canberra	A.C.T. 22.5.79	4102-4130
WRYELL, M.	Deputy Director General, Dept. of Social Security, Canberra	A.C.T. 23.3.79	1782-1826
WYNER, P.	Liaison Officer, Law Consumers Association Alfred Street, Milsons Point N.S.W.	Sydney 3.7.79	5133-5184 5210-5220
YATES, I. G.	Secretary-General, Australian Council of Social Services,	A.C.T. 9.2.79	1021-1075

ITINERARY OF CHAIRMAN'S VISIT OVERSEAS 28 JULY–20 AUGUST 1979

The Chairman visited:

Germany

1. THE MAX-PLANCK INSTITUTE FOR PRIVATE AND PUBLIC INTERNATIONAL LAW, HAMBURG—where he held discussions with members of the staff of the Institute engaged in the field of family law.

France

2. THE SECRETARIAT-GENERAL, THE COUNCIL OF EUROPE, STRASBOURG—where he met and discussed issues of mutual interest in the field of family law with representatives of the Committee of experts in the law relating to spouses and the Committee for Population Studies.

Great Britain

3. THE LAW REFORM COMMISSION OF ENGLAND AND WALES—for discussions with members of the Commission staff concerning recent developments in the field of family law.

   THE FAMILY LAW DIVISION OF THE HIGH COURT OF JUSTICE—to observe procedures and discuss relevant matters with Judges and officers of the Court.

   —while in Britain the Chairman met and discussed family law matters with academic specialists in the field of family law and officers engaged in the administration of the law.

United States of America

5. CIRCUIT COURT OF COOK COUNTY, CHICAGO, ILLINOIS—for discussions with Judges of the Domestic Relations Division of the court, staff of the conciliation service and members of the Bar.

6. LOS ANGELES COUNTY SUPERIOR COURT, LOS ANGELES, CALIFORNIA— where the Chairman met justices of the Conciliation Court, staff of the conciliation service and observed proceedings of the court.

Canada

7. FAMILY COURT OF EDMONTON—for meetings and consultations with Judges and Counsellors and staff of the Conciliation service and observation of the proceedings of the Court.

8. ALBERTA COURT OF QUEEN'S BENCH—for consultations with Judges and staff and observation of the proceedings of the court.

LIST OF TOPICS AND PARTICIPANTS AT SEMINARS

Participants in Seminar on Children—Canberra 31 August 1980

Mr Malcolm BROUN,
President,
Family Law Practitioners' Assoc.
44th Level, MLC Tower
Martin Place,
SYDNEY: N.S.W.

Mr Neil J. BUCKLEY,
Solicitor and Member of the
Family Law Council,
246 Queen Street,
BRISBANE: Qld.

Mr C. C. CRESWELL,
Senior Assistant Secretary,
Family Law Branch,
Attorney-Generals' Department,
CANBERRA: A.C.T.

Professor David HAMBLY,
Faculty of Law,
The Australian National University,
CANBERRA: A.C.T.

Dr Michael MALONEY,
Child Psychiatrist,
A.C.T. Mental Health Services,
CANBERRA: A.C.T.

Mr Peter MARK,
Counsellor,
ACT Family Court Counselling
Hobart Place,
CANBERRA: A.C.T.

Dr R. A. PARGITER,
Senior Consultant Psychiatrist,
Royal Hobart Hospital,
173 Macquarie Street,
HOBART: Tas.

Participants in Seminar on Property—Canberra 26 October 1979

Professor H. A. FINLAY,
Faculty of Law,
Monash University,
CLAYTON: Vic.

Mr J. GARSDEN,
Registrar,
Family Court of Australia,
BRISBANE: Qld.

Mr Richard W. GEE,
Barrister-at-Law,
174 Phillip Street,
SYDNEY: N.S.W.

Mr Gordon G. GOLDBERG,
Solicitor,
249 Bridge Street,
RICHMOND: Vic.

Dr Kevin GREY,
Queens College,
Cambridge CB3 9ET
United Kingdom
(on study leave—A.N.U.)

Mr W. P. JOHNSTON,
Principal Legal Officer,
Family Law Branch,
Attorney-General's Department,
CANBERRA: A.C.T.

Ms Dorothy KOVACS
Chief Examiner in Family Law,
Monash University,
CLAYTON: Vic.

Participants in Seminar on Jurisdiction—Canberra 23 November 1979

Mr Malcolm BROUN,
President,
Family Law Practitioners' Associ.
44th Level, MLC Tower
SYDNEY: N.S.W.

Mr C. CRESWELL,
Senior Assistant Secretary,
Family Law Branch,
Attorney-General's Department,
CANBERRA: A.C.T.

Mr R. M. DAVIS
Registrar,
Family Court of Western Australia,
44 St. George's Terrace,
PERTH: W.A.

Mr Justice NYGH,
Judge of the Family Court of
Australia,
Sydney Registry.

Professor C. HOWARD,
Dean,
Faculty of Law,
University of Melbourne.

Participants of the Reconvened Seminar on Children; plus discussion on Maintenance—30 November, 1979

Mr Malcolm BROUN,
President,
Family Law Practitioners' Assoc.
44th Level, MLC Tower,
SYDNEY: N.S.W.

Mr Neil J. BUCKLEY,
Solicitor and Member of the
Family Law Council,
246 Queen Street,
BRISBANE: Qld.

Mr C. CRESWELL,
Senior Assistant Secretary,
Family Law Branch,
Attorney-General's Department,
CANBERRA: A.C.T.

Mrs Ellen GOODMAN,
Law School,
Macquarie University,
NORTH RYDE: N.S.W.

Professor David HAMBLY
Faculty of Law,
The Australian National University,
CANBERRA: A.C.T.

Dr Michael MALONEY,
Child Psychiatrist,
A.C.T. Mental Health Services,
CANBERRA: A.C.T.

Mr Peter MARK,
Director,
Court Counselling,
ACT Family Court,
CANBERRA: A.C.T.

Dr R. A. PARGITER,
Senior Consultant Psychiatrist,
Royal Hobart Hospital,
173 Macquarie Street,
HOBART: Tas.

Mr G. M. WHEELER,
Registrar,
ACT Family Court,
CANBERRA: A.C.T.

LIST OF SECRETARIAT AND SUPPORT STAFF

COMMITTEE SECRETARIAT	EMPLOYMENT PERIOD
Ms P. Weeks (B.A.LLB) for preparation of background paper;	
Mr D. W. Nairn	October 1978–August 1980
Mr P. Reece	October 1978–November 1979
Mr M. Vanstone	October 1978–July 1979
Ms M. Ray	January 1979–August 1979
Mrs M. Finn	January 1979–August 1980
Mr D. Elphick	April 1979–August 1980
Mr B. Nordin	April 1979–August 1980
Mr D. Penman	July 1979–November 1979
Mrs R. Windsor	August 1979–August 1980
Mrs M. Lawrence	October 1979–June 1980

The Committee would also like to record its appreciation for the work done by the following:

Mr D. Grainger and other staff members of the Parliamentary Library;
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Appendix 3

THE EFFECT OF THE FAMILY LAW ACT 1975 ON THE INSTITUTION OF MARRIAGE AND THE FAMILY

by Kathleen M. Jupp

Discussion paper prepared for the Joint Select Committee on the Family Law Act

Joint Select Committee on the Family Law Act
Canberra, 29 February 1980

CONTENTS

INTRODUCTION

0.01 The Family Law Act 1975, which came into operation on 5 January, 1976, made a major change in the law relating to divorce (more precisely, dissolution of marriage) by providing that the sole ground for divorce in Australia was to be irretrievable breakdown of marriage, proof of which was to rest only on twelve months separation of the parties preceding the date of filing the application. In the words of the then Attorney-General, Senator Lionel Murphy, in his second reading speech, the main purpose of the legislation was 'to eliminate as far as possible, the high costs, the delays and indignities experienced by so many parties to divorce proceedings under the existing Matrimonial Causes Act.'* The Act made other important provisions of interest in the present context including provisions for reconciliation counselling and for conciliation of the differences between the parties, especially where children were concerned.

0.02 For the administration of the provisions, the Family Law Act set up a Family Court with a network of judges, counsellors, registrars and court officers. The Act also authorised the Attorney-General to establish a Family Law Council to advise and make recommendations to him on the working of the Act and other legislation relating to family law. It was to consist of a judge of the Family Court and such other judges, public servants, representatives and counselling organisations and other persons, as the Attorney-General saw fit to appoint. The Attorney-General announced the appointment of the Family Law Council in November 1976. It has submitted three Annual Reports on its work and has made recommendations for amendments to the Act and for other action.

0.03 On 28 September 1978, the Commonwealth Parliament announced the appointment of the Joint Select Committee of both Houses of Parliament to review the operation of the Family Law Act. The Committee was given broad terms of reference to inquire into the provisions and operation of the Act, and was to report its findings to Parliament by 31 December 1979.** This date was deferred to 31 May 1980, under an extension moved by the Chairman of the Committee and agreed to by Parliament.***

* Australia, Senate, *Journals*, 1 August 1974,, pp. 758-759.
** Australia, House of Representatives, *Votes and Proceedings*, No. 43 of 17 August 1978 and No. 53 of 26 September 1979, and The Senate, *Journals*, No. 44 of 17 August 1978 and No. 54 of 26 September 1978.
*** Australia, House of Representatives, *Votes and Proceedings*, No. 119 of 13 September 1979 and The Senate, *Journals*, No. 120 of 12 September 1979.

0.04 The present paper is prepared in response to the second of the terms of reference, namely that the Committee should report on the operation of the Family Law Act in respect of its effect on the institution of marriage and the family. The addition of this provision to the terms of reference as earlier proposed, reflects the strongly-differing opinions which were expressed about the functions, strength and stability of the family and marriage and the extent to which they might change for the better or worse as the result of the Family Law Act and, in particular, of its provisions regarding divorce. When, after the first year of the operation of the Act, it was seen that the number of divorces had risen from 24,307 in 1975 to 63,267 in 1976, the controversy was reactivated and much publicity was given to statements which attributed the increase to the Family Law Act.

0.05 The Committee has undertaken an extensive sounding of opinion amongst

representative groups of organisations and the public at large. Important as the evidence is in indicating the range of views held by the contributors, in the nature of the case much of it consists of value judgements. The institutions of marriage and the family are sacrosanct to many people and any change arouses fears of destruction of these basic units of society; others, of course, go to the extent of rejecting both marriage and the family; while again there are those who see the interaction of social and economic change and change in the family or marriage as an adaptive process which could solve problems for both.

0.06 The object now is to endeavour to separate the normative evidence from evidence which could be thought to substantiate objectively the present status of the family and marriage in Australia. The normative evidence is presented in Chapter II. It consists of a summary, prepared by the Secretariat of the Joint Select Committee, of the views expressed in the written and/or oral submissions to the Committee; organised around a number of issues that were the focal points of discussion. The rest of the paper consists of evidence, mainly demographic, on the patterns and directions of change in marriage and divorce and in family formation, size and structure. It should go further, but the necessary data do not exist or are very limited in scope, especially sociological and psychological research relating to marital breakdown (with or without separation or divorce) and statistics relating to stable *de facto* unions or other living arrangements not based on legal marriage. As is evident in various parts of this paper, the absence of such information makes it impossible to reach firm conclusions on a number of issues that have been raised.

0.07 Definitions of marriage and the family have been avoided as much as possible but for the most part it is formal legal marriage and the traditional concept of the family as based on legal marriage that is implicit in the discussion. This is so of necessity because only formal unions are documented, and it is formal unions and the traditional family that are believed by many people to be in a state of decline, at least in part as a result of the easier legal provisions for dissolution of marriage. However, it is by no means intended to overlook the existence of other kinds of union and other living arrangements which do not come within the traditional concept of the family as comprising a married couple (one of whom might be absent or dead) and children.

0.08 What seems most important is that both the institution of marriage and the family unit have been profoundly modified in function by demographic changes on the one hand and by economic, social and technological changes on the other; these changes have interacted to produce in Australia, as in other developed countries, not only higher material expectations but new expectations of the emotional and psychological rewards of marriage and of childbearing involving changes in the roles of all members of the family and in the interaction between them. The change in marriage is usually described as a shift from an institutional basis to an individualistic one, which in some cases remains childless but which in the great majority of marriages produces children. The principal function of marriage then becomes companionate whereas the traditional marriage is an arrangement mainly for the care and nurture of children, which is also one of the chief preoccupations of modern governments. Another function of marriage which appears to be widely recognised is the stabilisation of adult personality but in many cases the recognition is not made explicit but is to be inferred from discussions of lack of emotional maturity, failure to work at making the relationship work, adaptation to changed ideas of roles of husband and wife.

0.09 The degrees of responsibility which the modern welfare state assumes for support to the family has freed it of some of its functions but opened new possibilities

. . . in housing, security of income, health, education, day care for pre-school children and in other areas . . . and the prospect, especially for women, of greater participation in the labour force, with the psychological and financial benefits that accrue from such participation. This would have meant much less if there had not been such profound changes in the number of children borne by married women and the spacing of those births over marriage; as it was, they have been able to combine parenthood with work outside their homes, provided day care for their children is available.

0.10 Though there are still families living below the poverty line and in recent years unemployment has been substantial, most families have enjoyed a high standard of living and have been able to give their children benefits of the more affluent times. But we know that many marriages have ended in divorce, that many married couples have separated with or without divorce and that in an unknown number of others only the facade of the marriage remains. Apart from any questions of the future of basic social units, we need to know more about the causes of marital discord and its timing over the durations of marriage; about why some people separate and do not divorce; about remarriage; about sexual relations outside marriage. Some comment is offered on a number of these issues as they arise, and recommendations are proposed in Chapter I. The recommendations place considerable emphasis on the need for research in specific areas relevant to the above (See para. I.20).

0.11 It is noted that the Second and Third Annual Reports of the Family Law Council urged that the Institute of Family Studies, provided for in the Family Law Act, should be set up immediately because of pressing need for research into the factors affecting marital and family stability. In November 1979 the appointment of the Director of the Institute was announced, and it is hoped that some of its most essential tasks can be defined and initiated in the shortest possible time. The functions of the Institute, as specified in the Family Law Act s.116(3), are:

(a) to promote, by the encouragement and co-ordination of research and other appropriate means the identification of, and development of understanding of, the factors affecting marital and family stability in Australia, with the object of promoting the protection of the family as the natural and fundamental group unit in society; and

(b) to advise and assist the Attorney-General in relation to the making of grants out of moneys available under appropriations made by Parliament, for purposes related to the functions of the Institute and the supervising of the employment of grants so made.

I. CONCLUSIONS AND RECOMMENDATIONS

I.01 Implicit in the request to assess the impact of the *Family Law Act* 1975 on the institution of marriage and the family is the opinion advanced by many organisations and individuals that the increase in divorce after the introduction of the Act was caused by the Act. 'Liberalisation' of the provisions governing dissolution of marriage has occurred in a number of countries similar to Australia in socio-economic type: countries of Northern and Western Europe, including England and Wales; the United States of America; Canada and New Zealand. As in Australia, there were rapid increases in divorce after the changes in legal provisions and/or availability of legal aid. The relationship in time between the law and the number of divorces is, however, not a sufficient explanation of the increase in divorce, an opinion supported by many legal and sociological experts who point to the incidence of marital breakdown as the

essential issue and to decrees of dissolution as merely giving legal recognition to what was already an established fact.

I.02 It is also widely understood that there is no necessary coincidence between the numbers of marriages that have broken down and the number of divorces. In many instances husband and wife maintain the facade of marriage though the relationship has terminated *de facto* and in other instances there are large numbers who separate but do not seek divorce because of personal or religious opposition to it or because they do not place the same value on acquiring 'respectability' by regularising an existing informal union (if any) as do those who divorce. Separation was for long regarded as the poor man's divorce in the United States of America and elsewhere, and attitudes to marriage, separation and divorce continue to show differences by social class, though the precise ways in which these work are not adequately known. There is a great deal of emphasis on the spread of middle-class values as industrialisation transforms the socio-economic climate, brings greater affluence and raises individual and family aspirations. The effect of easier availability of divorce may thus be seen as closing the gap between the number of marriages that have broken down *de facto* and those that are dissolved *de jure*. (See para. III. 23).

I.03 However, the absence of divorce cannot be taken to indicate the absence of marital breakdown since the prohibition of divorce appears to lead to the proliferation of *de facto* relationships and to invidious distinctions between the rich and the poor in their capacity to circumvent the law. (See paras. III.23 and V.13 and 14).

I.04 In the case of Australia the long-term trend of divorce was upwards, as it was in the United States of America and, of course, the Family Law Act was instrumental in enabling a much larger number of persons to petition for divorce in 1976, the first year of its operation. In each year since then the number of divorces has declined and in 1979 the (provisional) figure was close to where it would have been had the pre-1976 upward trend continued but without acceleration. (See paras. III.22ff). Australia's crude divorce rate (per 10,000 population) fell from 45.5 in 1976 to 32.1 in 1977, 27.5 in 1978 and 24.8 in 1979, at which point the rate was close to the rates for Canada (23.4); Denmark (25.8); Finland (21.4) in the year 1976 (the latest year for which figures were available for all the countries named). The rate in the United States of America, which has been much in excess of the rates in other industrialised countries, stood at 50.0 per 10,000 population in 1976.

I.05 If the Family Law Act was not the main or only reason for the steep increase in divorce levels in Australia in 1976 and to a lesser extent since then, what did account for it? One element was that a backlog was built up before the implementation of the new Act comprising people waiting to take advantage of the more acceptable provisions. Another and very important element was that in the early 1970s the proportions of both men and women who were married were exceptionally high as a result of the marriage 'revolution' which had been achieved by younger marriage and by increasing proportions married in all age groups in the range 15 to 49 years. (See paras. III.06ff). This trend, which had been observed in other developed countries in the fifties and sixties, had drawn into marriage almost all those available for marriage including some who had no evident vocation for it.[1] In other words, the potential for marital breakdown and for decisions to divorce was being built up by the very popularity of the institution of marriage. (See para. III.12).

I.06 It remains to be seen whether in the next few years the number of divorces in Australia will continue the decline observed in and after 1977, and, if not, what its course will be. They may well decline because the recent decline in the number of marriages and the increase in age at marriage may be eliminating from the ranks of the

married some of those who were at high risk of divorce: brides pregnant at marriage and couples marrying before the age of 20 years, two categories known to be divorce-prone. (See tables III.2 and III.3 and paras. III.08 and III.27).

I.07 In regard to the institution of marriage, demographic evidence as such cannot do more than show that, despite the recent downturn in annual marriage rates, the proportions married are still very high and marriage is obviously still very popular. Part of the reason for this is that the majority of those who divorced remarried; 50 per cent of women divorced under 25 years in 1965 remarried within a year and virtually all within 6 years.[2] The widowed also remarry, but to a lesser extent than the divorced, the latter being much younger than the former. Remarriage rates have, however, been slackening off recently in Australia, just as they have done in other industrialised countries. (See paras. III.31 and III.32).

I.08 Because of lack of data, no answer can be given to questions of trends in *de facto* relationships or in other styles of living alternative to formal marriage. Increases in the number of people in these styles of life might be interpreted as rejection of formal marriage though informal unions appear frequently to precede formal marriage. Substantial increases as in Sweden in the number of couples electing to live in *de facto* unions could reduce the proportions married. The likelihood of this happening cannot be seriously discussed until action is taken to measure the incidence and outcome of such unions.

[1] *The Finer Report* (1974), vol. 1, p. 25.
[2] Caldwell, McDonald and Ruzicka (1978), p. 108.

I.09 Meanwhile, attitudes to marriage and childbearing as reported in the Melbourne Family Survey and related inquiries though cautious and sometimes critical, were on the whole favourable to marriage and to childbearing and opposed to early immature marriage and the risk of breakdown of marriage. (See paras. IV.01 and 02).

I.10 In respect of the family, decline in the first marriage rate and the increasing interval between marriage and the first birth meant a decline in the formation of new families, but this did not necessarily imply that the decline would continue into the future. The present high level of unemployment among young people and the alternatives open to women because of increased participation in the labour force had altered the situation substantially. Because of the age pattern of unemployment, younger people were less favourably placed for marriage and women who had jobs were putting a great deal of emphasis on continuing to work for some time after marriage in order *inter alia*, to gain work experience which would give them advantages in returning to work after the birth of the first child, withdrawing from work to bear the second child and returning once more after that to work more than likely until aged 50 years or more. (See paras. IV.24ff and V.05 to .07).

I.11 This pattern of participation in the workforce and its synchronisation with childbearing is a highly conscious adaptation of women's roles, combining marriage and parenthood with income-earning, and is perhaps both cause and effect of the small family size to which modern societies have been moving, Australia somewhat later than some other countries. Since 1961 marital fertility has been falling and since 1972 the absolute number of births has declined each year. The main demographic changes underlying the decline in marital fertility and the smaller average size of the completed family have been the following:

— higher age of women at first marriage (See para. III.29);

— increasing interval between marriage and first birth, sometimes beyond the fifth year of marriage (See para. IV.15);
— smaller average size of completed family (average issue a little over 2 children) (See para. IV.19);
— reduction of proportions of childless and one-child families; reduction also in the proportion of larger families (5 or more children and then 3 or 4 children) (See paras. IV.15ff);
— but the proportions of women with no children have increased in recent years; these however, may represent deferment of first births which would be made up later (See para. IV.17);
— differences exist between the overall average family size and that of certain sub-groups in the population (for example, by religion, education and occupation; by country of birth; by participation of married women in the labour force). However, these differences at their largest add only about one child per family, that is to say, all groups have been conforming to a much smaller family norm than the seven-child family of the nineteenth century and the six-child family of the early twentieth century.[3] Also the differences are tending to decrease amongst younger age groups (See paras. IV.26 to .35);
— one-parent families constitute a special demographic and socio-economic group, with smaller family size and lower than average income (See paras. IV.36 to .40);

[3] *Ibid*; p. 247.

I.12 A somewhat different set of considerations arises from the changing patterns and levels of childbearing, namely the effect on marital stability of events which are now recognised as causing stress, and which culminate in the departure of the last child from home, such as the arrival of the first and successive children, their going to school and leaving home. Early marriage, the concentration of childbearing into the first decade of marriage and longer life expectancy mean that only a small proportion of the total marriage . . . which may last over 40 years . . . is devoted to childbearing and also that both parents survive more than a decade after their last child leaves home.[4] (See para. V.02 and following). From this it follows that most children today have grandparents who are relatively active and young, who may play an important part in the children's life and who may give valuable support to parents provided the mobility of modern life makes this feasible. (See para. V.04).

I.13 If, however, the marriage terminates in divorce, it is most likely to do so 5 to 14 years after marriage. In 1977 the median duration of marriage at separation was 7.4 years; at divorce 10.9 years. On the assumption that very recent rates would continue, one in four marriages would end in divorce, but this is perhaps an overestimate, as the number of divorces, though inflated in recent years, has nevertheless been declining and may decline further, at least in the short-term. (See paras. III.25 to 29).

I.14 It is not evident *prima facie* that the family as described here is better or worse than the family ever was. Indeed, a tendency to idealise the family of the past obscures the fact that we do not know what the family of the past was like in reality. A few voices are raised in defence of the modern family, even though the vulnerability of individual families is acknowledged. Fletcher,[5] for example, concludes of the modern British family that the following characteristics are advantageous to it: its long duration, being founded at an early age; its small size; its being separately housed; its independence of the wider kin due to its being economically self-providing; the partners being of equal status; its democratic management; its being centrally and very responsibly concerned with the care and upbringing of children; and finally, its being

aided in achieving health and stability by a wider range of public provisions both statutory and voluntary.

[4] Young, C. (1977), p. 282.
[5] (1966), pp. 210-211.

I.15 Only the future can reveal whether the family described above will continue as it is now or whether it will be further modified. Possibly both marriage and the family, having already endured great change, will further adapt to social, cultural and economic change. An enlightened family policy may be successful in easing the lot of those who are most vulnerable to change, and to be successful such a policy requires further understanding of factors influencing the movements described so summarily above.

I.16 The need for a family policy seems amply demonstrated by the finding of various bodies appointed in recent years to inquire into socio-economic aspects of Australian life: the Royal Commission on Human Relationships, the Committee on Poverty, the Family Services Committee and the present Joint Select Committee on the Family Law Act. Irrespective of the levels of health and education and the high standard of living in the community at large, there are many families who do not measure up to the general standard because of mental or physical illness of one or more family members; because of the death or divorce or departure of one of the marriage partners, leaving one parent to struggle to support children financially as well as to care for them physically and emotionally; because of language or other sociocultural characteristics which limit the ease of social and economic participation in community life. Some of the problems are the result of poverty and some are the cause of poverty. Also there are problems in families that are affluent as well as in poor families, but in any case, children brought up in such conditions are likely to be affected for life by deprivation and/or negligence and . . . though the subject has not been at all adequately investigated . . . particularly where there is continued marital conflict and emotional stress.

I.17 Obviously there should be a relationship between the provisions of the Family Law Act and the content of a family policy but the latter should not be regarded in isolation from the demographic, socio-cultural, economic and psychological influences that effect attitudes to marriage, to family formation and to family-building patterns. Nor should these considerations exclude those relating to services already provided by Governments or likely to be required in future to meet the needs that may be diagnosed.

I.18 As may be inferred from the discussions of marriage, divorce, remarriage and the family, in subsequent chapters of this paper, demographic data are available on many of the relevant areas, but when it comes to the family as such, this is not the case. And even though marriage and fertility patterns have been subjected to intense examination in recent decades it is a commonplace demographic observation that knowledge of the factors influencing fertility and of the interaction of those factors is still unsatisfactory; and the same may be said of marriage. In the case of the socio-economic and psychological factors affecting the family internally . . . discord within marriage, decisions to separate and/or to divorce, decisions to remarry . . . increased research is essential if a comprehensive family policy, or even a partial policy, is to have a chance of success.

I.19 Under the provisions of the Family Law Act, the Institute of Family Studies has the crucial role of encouraging and co-ordinating research to identify the factors

affecting marital and family stability in Australia, in order to promote the protection of the family.

I.20 The following proposals are made for consideration by the Joint Select Committee in respect of research needs:

- Specialised advice should be sought on the sociological aspects of the Australian family which most urgently need elucidation in the light of the Government's needs for information that would suggest needs for action and kinds of action to be taken. To a non-specialist there appears to be considerable urgency of need to devise some comparability of approach, not rigid uniformity, in various kinds of inquiry, on what is a family and on the age at which a child ceases to be a child, on types of families that are sociologically significant in this country and on relationships between the type of family and the development of family members;
- Similarly, specialist medical, psychiatric or psychological opinion should be sought on research related to the factors affecting marital relations and relations between family members;
- Some of the research needed is mainly demographic in character but much of it is a combination of social, economic and demographic inquiry, as in population censuses or various kinds of sample survey; in addition there is the 'attitude' survey that has been used in investigating ideal family size, attitudes to marriage and childbearing and related questions. The Australian Bureau of Statistics, through the censuses and annual records can, and does, provide basic demographic data but it seems rather too optimistic to hope that these official sources could undertake to provide data on the extent to which *de facto* unions, parenthood without marriage or other life styles, may be displacing formal marriage and the traditional family. Since the questions necessary to elicit this and other relevant information need detailed and careful handling, it is probable that sample inquiries are more suitable than the exhaustive enumeration undertaken in the censuses;
- It is proposed that consideration be given to developing the family life cycle approach (described in chapter V) as applied on a sample basis in the Melbourne Family Survey, 1971 and in the related surveys, conducted by the Australian National University Demography Department. Results available from these surveys have provided information of great interest and relevance to the question of marriage and the family. The approach could be extended to cover a sample of all women above a specified age, and to record the marital status of each woman; by present age; age at marriage and at subsequent change, if any, of marital status; and childbearing history. Other characteristics of the woman, or her husband, or parents, or children could be added, as well as questions relating to attitudes to completed family size, reasons for marrying or wanting to marry and a variety of related questions. The objective of such an inquiry would be:
  (a) to obtain data on the timing and spacing of events over the lifetime of a marriage, arranged in stages which have been identified as constituting stress points in marriage and which would thus give information on points at which a married couple may need help, as from marriage counselling and/or in other forms. It would be considerably better if, in addition, family life education or some equivalent programme could be devised to predate marriage and to be made available through the schools or through other channels, to all adolescents. It would of course be necessary to

graduate the content to the age of the recipients and, imaginatively done, it could be helpful from ages below adolescence.

(b) to obtain information on the differences amongst respondents in respect of marital status and number of children, by age, and duration of marriage, according to specified socio-economic characteristics. The most important of these seem to be religion, education and socio-economic status (as measured by occupation of husband, or by income or education); birthplace, and the presence of one or both parents. To these should be added, with special emphasis, the pattern of labour-force participation of women, its timing in relation to the number and spacing of children, whether it is full-time or part-time, and whether occupation is a 'career' one or not. The emphasis is accounted for by the very strong impact of the working role of women on the matters at issue here.

(c) By distinguishing between women of different marital status categories, it should be possible to gain a better understanding of the characteristics of those who did not marry, those who married and have remained married, those who live in a *de facto* union, and those who are divorced, separated or widowed.

(d) In the case of the divorced, studies should be undertaken of the effects of divorce in respect of their implications for Government policy and in respect of their psychological, financial or other implications for divorcing couples and for children involved in divorce. The latter issue is an important one in regard to protection of the interests of children and better information is needed on the extent to which divorce as distinct from marital discord affects children, how this differs by age of the children, and the extent of recovery.

I.21 Design and content of such surveys will obviously present problems. It may be necessary to separate certain topics for inquiry in a sub-sample of a main inquiry. Divorce or marital discord and its effect on children may require approaches quite independent of those envisaged in the family life cycle approach referred to above.

I.22 It does not seem appropriate to this paper to link these proposals directly to specific provisions of the Family Law Act or of a national family policy, but the results of such inquiries should certainly facilitate the decisions to be taken by Governments in matters affecting marriage and the family.

II. SUBMISSIONS TO THE COMMITTEE

This chapter was prepared by the Secretariat of the Joint Select Committee on the Family Law Act.

II.01 In the course of its investigation the Joint Select Committee received some 500 written submissions which dealt with all or part of the terms of reference and which reflected a wide cross-section of views. The main arguments relating to this particular term of reference are summarised below.

Written Submissions

II.02 *Easy divorce damages the institution of marriage.* The main points raised under this heading were that the Act encourages people to look on marriage as a temporary arrangement, that there is no commitment to permanency and that it is the function of law to buttress the stability of marriage (Catholic Women's League of New South Wales and Australia; Australian Catholic Social Welfare Commission).

II.03 *The Act is damaging to families.* Statements under this heading refer to divorce leading to the breakdown of family life and the weakening of our social and economic structure creating a serious threat to our national security; to children of divorced parents becoming emotionally deprived and insecure (Catholic Family Welfare Bureau, Victoria); and to the Act failing to take account of the special role of women and undermining her position and well-being in the family (Women's Action Alliance).

II.04 *There is a contradiction within the Act in strengthening marriage and yet enabling dissolution to occur more readily.* Several groups argue that s.43 provides for preservation and protection of the institution of marriage, whereas s.48 enables this protective function to become destabilised by dissolution (Australian Catholic Social Welfare Commission; Women's Action Alliance; Centacare, Tasmania).

II.05 *The Act has not affected existing attitudes.* Proponents of this view contend that there is no evidence of any adverse affect and that in fact the Act has strengthened prospects for reconciliation or for a more satisfactory resolution of conflict, which is beneficial to all parties. (Dayton Neighbourhood House Office; Australian Legal Aid Family Law Advisory Committee, Law Council of Australia; Family Court of Australia). An increased rate of divorce is stated merely to reflect more accurately the incidence of marriage breakdown in the community (Mr Harvey).

II.06 *The Act reflects changes in attitudes.* Those who have based their arguments on this view stress that the Act is a reflection of more tolerant community views, that reasons for turning away from orthodox marriage are deeply rooted in the socio-economic structure of society and that it enshrines a new 'voluntary' principle of marriage in which both parties are volunteers (Department for Community Welfare, Western Australia; Legal Services Commission of South Australia; National Marriage Guidance Council of Australia).

II.07 *The Act has improved family life.* Many groups support the notion that a humane divorce law serves to protect the family by improving the home environment for children, enabling conflict to be resolved constructively, stressing reconciliation and encouraging mutuality of responsibility for the union and for the children (Women's Information Switchboard and Shelters, South Australia; Australian Legal Aid Office; Law Society of South Australia; Office of Women's Affairs; Uniting Church Commission on Social Responsibility; Legal Services Commission of South Australia; Women's Electoral Lobby).

II.08 Among other points raised by concerned groups for consideration by the Committee was the need for more pre- and post-divorce counselling. It was felt by many voluntary organisations engaged in marriage guidance that more effort should be made through education to alert people to implications of marriage and that the increased number of divorces indicates a lack of adequate education for marriage and adequate counselling. (Marriage Guidance Council of New South Wales; Marriage Education Institute, Victoria; Women's Action Alliance).

II.09 Most submissions in this area acknowledged the necessity for more data collection and empirical research. It was also stated that the Act in its failure to recognise anything other than the conventional family grouping was not providing alternative families with protection under the law. (New South Wales Lone Parent Federation; Gay Task Force).

Hearings

II.10 In appearances before the Committee by representatives of legal, religious, academic and welfare organisations, several claims and counter-claims were made on the interpretation of divorce statistics and the impact of the law on the institution of marriage and family life.

II.11 There was a general acknowledgement of the lack of data in the area and support for the early establishment of the Institute of Family Studies. Several witnesses referred to the increased divorce rates evidenced by the number of applications and decrees granted after 1975 as an indication of marriage breakdown and greater societal instability directly attributable to the Family Law Act.

II.12 Justice Evatt, appearing before the Committee as Chairman of the Family Law Council, questioned assumptions based on available divorce statistics and disputed the view that there was a direct correlation between the law and grounds of divorce on the one hand and quality of family life on the other, or a correlation between the law on divorce and the breakdown of marriage. The Judge further stated that she would be surprised if the Institute of Family Studies were to find that the framework of the law itself was a significant factor affecting marital stability in Australia. She concluded that the law had an effect on behaviour rather than on attitudes and that this belied any predictions based on increases in divorce statistics.

II.13 Another member of the Family Law Council, Mr Buckley, argued that if the large increase in divorce applications in 1976 and 1977 were ignored and the pre-1976 trend projected along a straight line then the recent divorce applications would be back on line. Moreover, the annual figures were still decreasing. The Family Foundation of Victoria disputed this and said that the figures are much higher than a projected line from 1975 figures. This is qualified in another statement where it was said that while the Act tended to accelerate an already-existing growth of divorce, there was no conclusive evidence that the divorce rate had risen solely or mainly because of the Family Law Act.

II.14 Professor Finlay, Associate Professor of Law, Monash University, maintained that the rise in divorce rates after the introduction of the Act would have occurred over time in any case as a natural consequence of changing attitudes. On the same point Ms McClintock, representing the Australian Council of Social Services, agreed that divorce was increasing greatly, even in countries with the most stringent divorce laws. She maintained that attitudes had changed, that more people were marrying, that longevity had increased and that therefore the potential number of divorceable people had increased.

II.15 Mr Ozdowski, a Projects Director in the Sociology Department of the University of New England who has carried out a major scientifically-conducted attitude survey in Australia on people's perception and awareness of the Act, arrived at the conclusion that the majority of people surveyed in his sample were not conscious of a general societal change in attitudes in relation to the liberalisation of divorce reform. He postulated that due to the increasing wealth of society and because the middle class is growing, there are fewer people at the bottom of the socio-economic scale in Australia and more people are applying for divorce in the legal way.

II.16 In an attempt to clarify problems resulting from a lack of definition of terms, Mr Wade, a lecturer in Family Law at Sydney University, stressed the need to distinguish between marriage breakdown and divorce. He cited the example of Italy where, until the 1970s, there were no divorces but a huge rate of marriage breakdown.

Any attempt to correlate the divorce rate and the marriage breakdown rate would therefore be spurious.

II.17 There are two major arguments raised by individuals and groups who have testified to the Committee about the effect of the Act on the institution of marriage: these centre around permanency and the degree of commitment which people undertaking marriage have to a long-term relationship.

II.18 According to the Family Foundation of Victoria, the Act discourages the commitment necessary for marriage to flourish. Similarly, the Catholic Welfare Organisation, Centacare, asserts that legislation itself affects community standards. It maintains that the law is so phrased that for many people it becomes moral law and that civil law generally becomes a standard of behaviour. This view is also shared by Women's Action Alliance whose members feel that the legislation counters the stabilising influence on marriage which it is Parliament's role to maintain.

II.19 A considered view is put by the Western Australian Department for Community Welfare which said that the Act has not had a direct effect on marriage. It maintains, however, that law and society act in tandem and that if there is a change in the community then the law is changed to compensate for this.

II.20 On the other hand, according to the Law Society of South Australia, there did not appear to be any discernible change in attitudes to marriage. Their clients were generally unhappy and bitterly upset that their marriages had broken down, and these people included those married since 1976. The Family Law Council reported that the Act did not itself affect the institution but that it did influence the relationships of parties to the marriage at the point of breakdown and subsequently.

II.21 The Family Law Council, felt that despite the trauma of divorce, remarriages were found to occur frequently and marriage was still a very popular institution. It appeared that a very great proportion of people did learn from their experiences as remarriages were found to be far more stable. The point was also made that marriage rates increased after 1975 due to remarriages.

II.22 A wider perspective was taken by Mr Wade who considered that the definition and meaning of marriage had to be determined from history and widened to take in a range of *de facto* relationships. The Church of England Social Questions Committee agreed that the incidence of marriage breakdown had risen sharply in the last few years in Australia, but attributed this to an overall pattern in Western European societies.

II.23 On the questions of indicators, Mr Harvey from the Attorney-General's Department, suggested that the number of deserted wives is a more accurate measure of instability than divorce rates and that, if there were fewer deserted wives but more divorces, it would follow that there was a better sorting out of relationships. He also maintained that rates of marriage and divorce have been found to be affected by unemployment, wars and economic circumstances.

II.24 Some evidence in this area took the form of general and unqualified statements to the effect that the law has a great educational role and determined people's attitudes to all sorts of things, without factual substantiation.

II.25 The other area of concern under this term of reference is the family and the extent to which it is changing and being influenced by factors such as the Family Law Act.

II.26 One of the difficulties in coming to terms with the problems subsumed under

this heading is to determine the nature and scope of the family. Dr Maloney of the Mental Health Branch of the Capital Territory Health Commission, stated that it was difficult to define the family. The family concept, apart from connoting an institutional arrangement within which people live, is a question of emotional relationships that are not a function of distance or proximity, but a function of how much people care for one another.

II.27 According to Ms McClintock, (Australian Council of Social Services) the family is the central way our society is organised and the first line of support between the individual and the total society. A general definition is attempted in 'a nurturing group in a caring situation'.

II.28 It was generally agreed that the Institute of Family Studies should undertake research on and determine social indicators for decision-making and study the consequences of family breakdown, extended relationships, blended families, single-parent families, roles of step-parents and related factors.

II.29 Whereas Centacare and the Family Foundation of Victoria express concern at the impact of the Act on family life, and feel that Parliament has a moral obligation to safeguard family stability, this view regards the family in the traditional sense as one or two parents and their children.

II.30 Mr Ozdowski applauds the Family Law Act as having adopted a more egalitarian concept of the family by its recognition of the role of women.

II.31 The Family Law Council expresses a common view of many witnesses in voicing concern at the effect of divorce on children of the marriage. It is recognised that young and impressionable children may suffer long-term consequences from the breakup of the parents and that this will be difficult to rectify. Reference was made to s.43 of the Act and said that the Court had resorted to this section on several occasions, particularly when faced with conduct by one party which may affect the relationship between parents and children.

II.32 The foregoing represents the wide range of views and evidence presented to the Committee and provides a framework for later chapters in that it highlights the problems encountered in trying to assess objectively the impact of the legislation on existing relationships and the difficulty of making precise predictions.

III. MARRIAGE, DIVORCE AND REMARRIAGE

Background: Long-Term Trends

III.01 For most of the nineteenth century the demographic history of Australia was dominated by the colonial origins of the settlers; until near the end of the century there were irregularities in the composition of the population by age and sex arising from the predominance of adult males amongst the immigrants on whom the colony was dependent for growth and development; also discontinuities in the volume of immigration affected some age ranges much more than others. As the proportion of women from overseas increased and the sex ratio became more normal, it was possible for higher proportions of men to marry and form families but it was not until the 1891 census that the Australian born population outnumbered the overseas born. Immigration continued to be regarded as a necessary contribution to population growth in prosperous time and could be slowed down or stopped in times of recession. The immigration stream was overwhelmingly of British or North Western European origin until World War II and, though the intake has been diversified since then, the population was still 98 per cent of European origin at the census of 1971.[6]

III.02 As has been frequently noted, the newcomers brought with them and retained the social and cultural values of their homelands and acted as a channel of communication of those ideas to the Australian born. The significance of this is that Australia, like the United States, Canada and New Zealand experienced the same kind of profound long-term demographic change as did the metropolitan countries from which the overseas settlers originated.[7] There were differences in timing and of degree amongst the countries involved, but the patterns have been similar and have been converging over a long timespan. The usual, though not the invariable, sequence was steep declines in mortality and consequent increases in rates of population growth, followed by declining fertility levels.[8] In the former case . . . the reduction in mortality . . . the increased expectation of life at birth was largely the product of reductions in infant mortality rates so that, other things being equal, parents and children would form larger familial units and live more years as a social group.

[6] *The Borrie Report* (1975), vol. 1, p. 119.
[7] Ruzicka and Caldwell (1977), chapter 1.

III.03 In the instance of fertility change in Europe and in countries of European settlement overseas, the downturn occurred relatively early in France (near the end of the eighteenth century) and in the United States of America (early in the nineteenth century). This movement became general among the countries of northern, western and central Europe during the first quarter of the present century[9] but the full effect of the changes in family-building patterns was obscured by increases in marriage rates and increased numbers of birth, particularly after the second World War during the 'baby boom', which was a nearly general phenomenon in Europe in the period. However, after 1964 the downward trend was resumed and it was severe—the levels reached in most cases being the lowest ever observed.[10] Changes in nuptiality played a large part in this decrease in births, just as they had done in the increase in births in the 'baby boom'; but the fact was that fertility of married women was declining and the average family size was becoming small indeed. The result was that by the early 1970s the preferred average number of children per family in Europe had fallen to 2.0,[11] a size insufficient, in the long run, to secure replacement of the generations, unless marriage rates were extremely high and mortality extremely low. The United States of America and a number of countries in Europe have been in the situation of sub-replacement fertility for some years now.

[8] United Nations Secretariat (1975(a)), vol. 1, p. 7.
[9] *Ibid.*
[10] *Ibid.*
[11] United Nations Secretariat (1975(b)), vol. 1, p. 295

III.04 This is the broad context in which Australian demographic behaviour must be studied: there have been similar 'revolutionary' changes in marriage and in fertility levels in this country, with comparable difficulties of sorting out long-term and short-term aspects of recent downturns in fertility and in marriage, divorce and remarriage.

Marriage Patterns and Trends

III.05 In his investigation of marriage patterns from 1860 to 1971 in Australia, McDonald[12] describes the special character of the marriage market in the colonial period, as well as changes in the present century when the composition of the population was more normal and greater freedom existed in the choice of marriage partners. Most analyses of the patterns and trends of marriage in Australia draw substantially on this source. In the present instance, it is the period since the 1921 census which is of the most interest but occasional reference to the latter part of the nineteenth century helps to stress the great contrast between conditions then and those that evolved in recent times: late age at marriage and high proportions never married, especially amongst men, as contrasted with almost universal and comparatively very early marriage in recent decades.

III.06 The trends in marriage are clearly to be seen in census data of proportions of males and females ever married by age: these are shown in table III.1 which traces the changes from 1891 to 1976 in the proportions ever married in the age groupings most relevant to marriage and, in the case of women, to reproduction. The most striking feature amongst both sexes is the great increase after World War II in the proportions ever married, whereas before the War there had been relative stability in the levels for several decades. The Depression of the 1930s had had some effect in delaying marriage and the two wars had caused fluctuations in marriage rates which were to be expected in view of the nature of troop movements to and from overseas for military service. It is the steep increase after the War to the very high proportions of 1971 that has constituted the basis for the use of the term 'marriage revolution' to describe the processes whereby 86 per cent of men had married before age 35 years in 1971 (as compared with 60 per cent in 1891) and 94 per cent of women in 1971 (as compared with 82 per cent in 1891). In the case of women, 95 per cent had married before age 45 years in 1971, leaving a mere 5 per cent in the never married category. The proportion amongst males was also above 90 per cent. That is to say, by 1971, marriage had become almost universal with obvious implications, in the case of women, for the possibility of increased births resulting from the very high proportion of women of reproductive age.

[12] McDonald (1975).

III.07 It is useful to look at two associated features of marriage patterns and trends shown by two simple measures . . . again concentrating on trends up to 1971 . . . before looking at the period from 1971 to 1976 and from then to the present. The marriage revolution involved increasing numbers of marriages and increases in the crude marriage rate. Immediately after the Second World War, the crude marriage rate rose to 9.8 per 1,000 population, fluctuated at somewhat lower levels after that but remained high into the mid-seventies. However the absolute number of marriages reached its highest level in 1971 (see table III.2) after which the numbers declined in every year, except 1976, up to and including 1978.

TABLE III.1 Proportions Ever Married by Age at Censuses, Australia, 1891 to 1976

Age group	*1891*	*1921*	*1933*	*1947*	*1954*	*1961*	*1966*	*1971*	*1976*
				Males					
20–24	11.0	14.6	12.9	23.5	25.5	27.2	30.1	36.1	33.4
25–29	38.9	47.8	43.9	62.1	63.5	66.8	70.8	74.3	74.3
30–34	59.9	68.6	67.4	78.3	80.4	80.8	83.9	86.1	86.9
All ages 15 and over	47.1	57.3	58.0	67.0	70.2	70.2	69.5	70.7	70.9
				Females					
20–24	34.9	33.6	31.2	48.6	59.0	60.5	59.5	64.3	60.1
25–29	67.2	63.5	62.4	79.0	85.0	87.6	87.8	88.4	87.1
30–34	82.2	76.2	77.5	86.3	90.4	92.3	93.2	93.5	93.2
35–44	89.4	81.7	83.9	87.2	91.1	93.5	94.5	94.6	95.3
All ages 15 and over	62.0	64.2	65.0	73.6	78.5	78.9	78.0	79.3	78.9

Source: The Borrie Report, (1975), vol. 1, p. 59 1976 census data added.

TABLE III.2 Marriages Registered, and Crude Marriage Rates, Australia, 1946 to 1978.

Years	*Annual averages*	*Crude Marriage Rates (Marriages per 1000 population)*
1946–1950	75,891	9.8
1951–1955	73,102	8.3
1956–1960	73,854	7.5
1961–1965	83,250	7.6
1966–1970	106,188	8.8
1971–1975	111,803	8.4
	Annual totals	
1971	117,637	9.2
1972	114,029	8.8
1973	112,700	8.4
1974	110,673	8.1
1975	103,973	7.5
1976	109,973	7.9
1977	104,918	7.5
1978	102,958	7.2

Source: Australian Bureau of Statistics, *Marriages*, 1976 to 1978, Cat. No. 3306.0.

III.08 The increasing numbers entering into marriage each year up to 1971 involved growing proportions of young people in marriage and the median age at first marriage fell by 3.6 years for bride-grooms and 2.9 years for brides in the fifty-year period 1921–25 to 1971–75 (table III.3). While the median age at first marriage did not fall below 23.3 for men and 20.9 for women, teenage marriage was increasing and was seen as constituting a social problem because of the high risk of failure to youthful marriages. The increase is shown in the marriage rate of bachelors and spinsters aged 15 to 19 per 1,000 unmarried males or females of that age group as follows:[13]

	1947	*1954*	*1961*	*1966*	*1971*	*1976*
Bachelors	6.5	7.8	10.5	14.9	16.3	10.3
Spinsters	49.1	57.7	56.7	61.5	72.4	50.9

III.09 The peaks are again reached in 1971 and we see that it was this year which appeared to represent the most advanced stage of the marriage revolution, after which there was some levelling off of the proportions married, a decline in the absolute number of annual marriages, an increase in the median age at marriage and a decline in the proportion of teenagers who were marrying in the years specified.

III.10 A number of demographers have emphasised the implications of the fact that the enlarged numbers of births from the mid-forties on (the 'baby boom') were reaching marriageable age in the early 1960s.[14] The young women reached marriageable age slightly sooner than the young men because they marry 2 or 3 years earlier than men, with two effects: more young women looking for husbands than there were men of the right age for them, and consequent extra pressure on the men to marry; and an absolute increase in the numbers of men and women of the age to marry. It is probably this that explains a considerable part of the trend to early and near-universal marriage, but it is unlikely that it could explain why so large a proportion of both men and women chose to marry and to marry so early at the very time when many more options were opening up to them in the varied and more permissive society of the period. When we consider the changes occurring within marriage . . . relations between partners, labour force participation of women, as well as of men, childbearing patterns and the small size of the completed family . . . it appears that psychological, social and/or economic factors must have been important in attracting such large proportions into early marriage. It is, however, no easy matter to pin-point the combination of factors that may have been crucial. In this context reference is made to the monographs of the Australian National University produced as part of the Australian Family Formation Project, especially those by Caldwell *et al.* (1976) and Ruzicka and Caldwell (1977). The authors put considerable emphasis on the deep-seated nature of the general social and economic changes that were occurring; on the increased technological efficiency of control and spacing of the number of children born; and on the increasing participation of married women in the workforce with all its implications for the role of women in marriage.

[13] Australian Bureau of Statistics, *Marriages*, 1978, Cat. No. 3306.0.
[14] McDonald (1975), p. 196; *The Borrie Report* (1975), vol. 1, pp. 6-8 and 62ff; Hall (1976), p. 45; Glick and Norton (1977), p. 6.

TABLE III.3 Median Age of Bridegrooms and Brides, Australia, 1921 to 1978.

Five-year period	Median age at first marriage: *Bridegrooms*	*Brides*
	Five-year averages	
1921–25	26.9	23.9
1926–30	26.4	23.4
1931–35	26.5	23.4
1936–40	26.7	23.7
1941–45	25.7	22.9
1946–50	25.5	22.4
1951–55	25.0	22.0
1956–60	24.7	21.6
1961–65	24.2	21.3
1966–70	23.5	21.2
1971–75	23.3	21.0
Years	*Annual*	
1973	23.3	21.0
1974	23.3	20.9
1975	23.4	21.0
1976	23.6	21.2
1977	23.8	21.4
1978	23.9	21.6

Source: Australian Bureau of Statistics, *Marriages*, 1978, Cat. No. 3306.0.

III.11 The question of major interest for this review is the assessment of the changes in marriage patterns since 1971 in Australia. It is obvious from the data of tables III.2 and 3, already discussed, that there was a decline in the absolute number of marriages and in the crude marriage rate after 1971 and that it continued through 1978 while the decline in age at marriage ceased in the early seventies and was then reversed. The census data for 1976 . . . the only one conducted in the crucial period . . . showed a decline in the proportions of males and females ages 20 to 24 years who had ever married (table III.1 above) and a slight decline in the proportion of females aged 25 to 29 years, but the proportions on the whole still remained very high indeed: 91 and 95 per cent of males and females respectively had married before age 45 years.

III.12 In fact, the proportions ever married by 1971 were so high that some levelling off was inevitable because the rising trends of the 1950s and 1960s were drawing in almost everyone available for marriage. This was noted in *The Borrie Report*[15] which also expressed the view that the downturn might have gone a little further than a mere slackening off but there would clearly be a long way to go before the very low pre-1961 patterns could begin to appear. From another viewpoint, expressed in the Report of the Committee on One-Parent Families[16] in regard to the high proportions ever married in 1971 in England and Wales (91 per cent of males and 92 per cent of females aged 45 to 49), the present popularity of marriage must have been 'drawing into the institution large numbers who lack any evident vocation for it'. This sentiment appears to suggest psychological and physical limits, additional to the numerical limits of supply of partners, which it was not practical for marriage proportions to exceed for long. In other words, if the proportions married exceed certain limits related to mental

and physical health, sex preferences or other factors, marital discord would increase and the divorce rate also.

III.13 Examination of the census data on those who were currently married at the successive censuses throws further light on the problem. Table III.4 shows these proportions for women at the censuses of 1921 to 1976. The figures reveal increasing proportions up to and including 1971 in each five-year age group 15 to 19 to 40 to 44 years. In 1976 the proportion was lower in each of the age groups, and the decline was more marked than the slight declines in the proportions ever married in some age groups (table III.1). This might be expected in view of the fact that table III.4 excludes the divorced and widowed, though it would, of course, include divorced and widowed if they had remarried. Remarriages had in fact followed divorce in many cases and had helped to sustain the proportions currently married. Examination of census data in 1971 and 1976 also reveals declines in the proportions married amongst males up to the age group 30 to 34 but there were small increases at ages 35 to 39 and 40 to 44; possibly the pattern for males was influenced by a greater extent of remarriage than had occurred amongst females at the ages considered.

[15] (1978), p. 27.
[16] *The Finer Report*, (1974), pp. 25-26.

III.14 Again, 1976 itself was an exceptional year in that the Family Law Act had just come into force (on 5 January). Divorce almost doubled in that year and the circumstances of many couples must have been atypical at the time of the census (30 June). Some of the extra divorces would have occurred by the end of June but probably the group most affected was those who were separated and with an application for divorce pending at the time of the census. Census data on marital status are usually subject to some bias from the fact that respondents choose a preferred category: some divorced persons may prefer to say they are permanently separated and some of those in *de facto* unions may do the same. There is at present no reliable means of assessing the accuracy of the data, and, it must be repeated, no quantitative data on *de facto* unions which would help to indicate whether these are replacing traditional legal marriage to an increasing extent. Even if there were data on such unions it would still be impossible to know whether and to what extent they would lead to legal marriage at a later stage.

III.15 This brings up the general question of whether the changes in marriage patterns represent changes in trend or whether they are temporary fluctuations, reflecting deferment of marriage for reasons such as career advancement, the general employment situation or other economic or social conditions. It is still too early to know what will be the experience of cohorts recently arriving at marriageable age by the time they reach 30 to 35 years of age, that is, when their chances of first marriage would be virtually complete. Meanwhile, the annual experience, as measured by 'period' rates must be viewed with caution, just as annual birth rates or reproduction rates must be assessed against the fertility experience of specific cohorts to narrow down the population actually at risk and more time must elapse before that can be done.[17] The problem, or part of it, lies in the recency of the downturn in marriage in Australia as compared with other countries.

TABLE III.4 Percentage of Women Currently Married,* by Age, Censuses, 1921 to 1976.

Age group	*1921*	*1947*	*1961*	*1971*	*1976*
15–19	3.6	5.6	7.0	8.8	7.4
20–24	33.2	48.0	60.2	63.7	58.6
25–29	61.8	77.0	86.6	86.8	83.9
30–34	73.3	83.3	90.4	91.1	88.8
35–39	76.7	83.5	88.5	91.5	89.9
40–44	76.0	81.2	85.1	90.0	89.2

* Includes permanently separated
Source: Australian Bureau of Statistics census statistics.

III.16 Once again there are broad similarities in the demographic behaviour of the industrialised English-speaking countries and the countries of continental Europe: McDonald[18] stressed the resemblance between Australia, New Zealand and England and Wales in the timing of the onset of the marriage boom in 1940. In the United States the increase in marriage began a little later, while in continental Europe there were considerable differences in its timing. Caldwell *et al.* in an analysis of nuptiality and fertility in Australia in the period 1921 to 1976[19] noted also that the downturn in marriage as measured by declines in the proportions currently married was subject to differences in the extent of the decline. For example, in the United States, Canada and Sweden there were substantial falls, in both periods reviewed . . . that is, 1960/61 to 1970/71 and 1970/71 to the most recent date; in Australia, New Zealand and Denmark, there was a slight fall in the first period and a substantial fall in the second; in England and Wales, Norway and Hungary, there was no fall or only a slight fall in both periods; in one or two instances there were increases in the earlier period followed by decline or stability in the second. Commenting on the postponement of marriage in the United States in the period 1960 to 1977, Glick and Norton[20] noted that the baby boom continued to have a marked effect on the first marriage rate in that country, namely, increased unemployment resulting from the swollen numbers seeking work in the past decade and the inability of the job market to absorb them.

[17] See Annexure 1.
[18] (1975), pp. 203-204.

III.17 Caldwell in a paper on family patterns and lifestyles[21] makes some observations on current trends in marriage in Australia which are of interest in placing the Australian marriage patterns in context:

> 'Something began to happen to Australian marriage in the 1970s although not nearly as much as had been heralded by the much greater changes which had taken place in America and Sweden, originating in both countries well back in the 1960s and given much publicity in both demographic and popular literature. Indeed, so late was the change in Australia that it mostly post-dates the beginning of the economic recession, and there is a real question as to whether we are dealing primarily with social change or with economic difficulties.
>
> 'During the 1970s marriage rates have been falling for the first time for over 40 years. Nevertheless, the fall has not been great and the proportions of women married in each age group shown by the 1976 census were higher than at any time this century prior to the late 1950s and probably higher than had been the case in Britain for the last 400 years. Half of all Australian women are still married by 22 years of and four-fifths by 27 years. Indeed, half the decline in the proportions currently married can be explained not by delay in first marriage but by delay or failure in remarriage after divorce. It might be noted that since the

late 1960s Australians have been marrying earlier and in greater proportions than Americans for the first time in our histories'.

III.18 The remarks on marriage, divorce and remarriage bring home the point that it is impractical to look at marriage in isolation from the alternatives to it. Apart from stable *de facto* unions, to which reference has already been made, what are the available alternatives? Rejection of marriage of the traditional type and adoption of one of the current styles of uni-sex or of commune living? A solitary mode of life perhaps rejecting sex as well as marriage? Alternatives of this kind suggest antipathy to marriage but observed behaviour described in the statistics of marriage and childbearing suggest that most people want to marry and also want to bear children. However, many want also the options of divorce and remarriage if their initial marriage degenerates into discord. The following section therefore reviews the way in which marriage, divorce and remarriage have interacted in Australia in recent decades.

[19] Caldwell, McDonald and Ruzicka (1978).
[20] Glick and Norton (1977), p. 6.
[21] (1979).

Divorce and Remarriage

III.19 Separation, legal or *de facto*, and widowhood can put an end to a marriage just as effectively as can divorce, but widowhood is not dealt with extensively here because it has had a relatively small impact owing to low levels of mortality in Australia in this century. Also, as it does not represent the failure of a personal relationship between the partners to a marriage, it is not germane to the present line of discussion which is to try to outline the trends and patterns of marital breakdown. Divorce does represent marital breakdown and so, of course, does permanent separation. And additionally there are many marriages which have in reality failed but where no action is contemplated to separate or divorce because of religious conviction, economic stringency, reluctance to admit failure and other reasons.

III.20 It is evident that the task is not an easy one and it is not made easier by its being undertaken in relation to the effect of the Family Law Act on the institution of marriage and the family, a law which has been in effect for such a drastically short period that its effect on the statistics of divorce could at the time of writing, be examined in any detail for only two years (1976 and 1977), and everyone divorced in 1976 must necessarily have been separated before the Act came into force or they could not have met the requirement of twelve months separation from the date of filing the application. Further, the steep increase in numbers in 1976 was reversed in 1977, with a further fall in 1978 and a projected further fall in 1979. If this is confirmed, the level would be close to what it would have reached had the upward trend in the pre-1976 period continued to the present. The recency of the Family Law Act and the decline in the number of divorces in 1977 and subsequently make it impossible to assess future trends of dissolution of marriage, especially marriages that have taken place since the Act came into force. Few divorces take place in Australia under 5 years of marriage and moreover age at marriage is itself increasing; it becomes highly relevant to remember that a divorce implies the existence of a legal marriage and one would expect a decline in divorce if marriages decline at the ages most at risk, unless the patterns of divorce by age are changing as well as the overall levels. The 1981 and 1985 censuses will be of great interest in regard to marriage and divorce patterns and trends Meanwhile the annual data can give only speculative solutions at this stage to the future movements of marriage and divorce.

III.21 The trends and characteristics of divorce in Australia since the turn of the

century and up to the early 1970s have been analysed by Lincoln H. Day[22] in a series of articles using official statistics for New South Wales and the Commonwealth. Apart from their intrinsic value as part of the social history of the period, the findings provide some interesting contrasts with the levels and trends of divorce in the United States in the comparable decades. Day's conclusions fill in the essential background to the current changes in divorce in Australia, and little could be added to his analysis except to bring the picture up-to-date so far as available data permit it.

III.22 The fundamental point is the long-term, secular increase in divorce in Australia, with some fluctuations around the trend; for example, there was some decline in incidence during the depression of the 1930s while in the immediate aftermath of World War II there was a considerable increase, as many of the stresses and strains of family life in wartime took their effect in divorce and, in many cases, remarriage. In the 1920s and 1930s the annual number of divorces was around 2,000 per year on average and did not exceed 10,000 per year until the second half of the 1960s. The increases in the 1970s were steeper than in the preceding decades but were not spectacular until 1976. As can be seen from the data of table III.5 where the divorce rate is calculated as a rate per 1,000 marriages registered in the same year, the level was 5 times as high in that year as in 1971, but has fallen in the years since the Family Law Act came into operation. Crude divorce rates are added in the last column because, though not precise enough in relation to the population at risk, they are often the only data available for comparison with other countries over time.

[22] (1963, 1964, 1976 and 1979).

TABLE III.5 Marriages and Dissolutions

Numbers and Dissolution Rates per 1000 Marriages, 1971 to 1978.

Year	*Marriages registered*	*Dissolutions*	*Dissolutions per 1,000 marriages in the same year*	*Dissolutions per 10,000 population*
1971	117,637	12,947	110	10.0
1972	114,029	15,655	137	11.9
1973	112,700	16,195	144	12.2
1974	110,673	17,688	160	13.0
1975	103,973	24,257	233	17.6
1976	109,973	63,230	575	45.5
1977	104,918	45,175	430	32.1
1978	102,958	39,268*	382 (p)	27.5 (p)
1979	—	35,787* (p)	—	24.9 (p)

* From Family Court data
(p) Provisional

Source: Australian Bureau of Statistics, *Marriages*, 1976 to 1978 Cat. No. 3306.0 and *Divorces*, 1976 and 1977, Cat. No. 3307.0

III.23 The one census in the period during which the notable increase in divorce occurred was taken only six months after the Family Law Act came into operation and the data on marital status, especially in divorce, may be subject to bias in respondents' replies. In addition, 1976 was a special year for many couples awaiting the completion of one year's separation that would qualify them for a decree of dissolution under the new Act. It would be of considerable interest to have more precise information on the

various marital status categories including the correlates of *de facto* separation without resort to divorce. The question was raised by Ailsa Burns[23] who argued, with support from Australian social security data and from the experience of earlier periods in the United States and England and Wales, that in Australia separation without seeking divorce was correlated with lower economic status than was divorce. Though in both the United States and England divorce is no longer characteristic mainly of the middle or upper classes, there were still residuals of the former difference. Burns cited the tendency in England for the poorer sections of the population to seek separation orders through the magistrates' courts even after the Legal Aid Act of 1949 came into force. In the United States, Glick and Norton[24] reported recent increases in divorce as against separation as a means of resolving marital conflict, but amongst those who remained separated there was a disproportionately large number of men with low levels of education or economic status and, in the non-white population, the proportion separated in 1976 was 6 times as high as in the white population. It may be that in Australia the high divorce levels in 1976 and 1977 were partly accounted for by a narrowing of the gap between *de facto* broken marriages and legal terminations of marriage not only because of the more palatable procedures for divorce under the Family Law Act but also because higher levels of education and income had induced a change of attitude on the respective merits of separation and divorce. In addition, there is some inducement to women to seek divorce under the new Act in that it enables them to apply for redistribution of property.

[23] (1974), pp. 309-311.
[24] (1977), p. 15.

III.24 Other measures of the trend of divorce over time are based on the numbers of males or of females by age, who are in existing marriages at a given point of time and these are normally available only for census years. Decrees of dissolution of marriages of women aged 15 to 44 years per 1000 married women in that age range were at a modest 4 per 1000 in 1961, rose to 6 in 1971 and jumped to 22 per 1000 in 1976. The break in comparability of data, and the knowledge that the number of divorces has been decreasing since that year, reduced the value of the series. The availability of annual data from 1950 onwards enabled Day to estimate the number of existing marriages by duration and to calculate the number of divorces per 1000 of these marriages by duration.[25] (table III.6)

TABLE III.6 Divorces per 1000 Existing Marriages by Duration of Marriage, Australia, 1961 to 1971.

Duration of marriage in years	*1961*	*1966*	*1971*	*1976*
Under 5	1.4	1.9	2.4	19.3
5–9	5.4	6.9	9.6	17.6
10–14	4.4	5.7	7.2	28.1
15–19	3.2	4.8	5.6	22.5
20–24	2.8	4.1	4.8	18.7
25–29	2.0	3.2	3.7	15.0

Source Day (1976), p 69; 1976 census statistics and Australian Bureau of Statistics, *Divorces*, 1976, Cat. No. 3307.0.

III.25 The low proportions of marriages which ended in divorce under five years of marriage, the concentration at 5 to 14 years of marriage and the relatively even spread above these durations persisted up to 1971, with some increases in the rates at each of the specified durations. In 1976, however, the proportion of marriages ending in divorce at low durations (under 5 years of marriage) increased eight-fold, whereas at higher durations the increases were four-fold or less. The increases at low durations no doubt reflected the relative ease with which divorce could be obtained under s.48 of the Family Law Act compared with the procedures for establishing grounds for divorce under s.28 of the Matrimonial Causes Act 1959. Again, however, comparability of 1976 with earlier censuses breaks down because of the fundamental change in the conditions of divorce.

[25] (1963), pp. 137-139 and (1976), pp. 69-70.

III.26 Another factor was the increase in the proportions of teenage marriage in the two preceding decades and the fact demonstrated in a number of studies[26] that these are subject to high risks of breakdown. An illustration of this is that, of the dissolutions granted in 1977, 11.7 percent of husbands and 40.7 per cent of wives were married before age 20 years and the proportions were only slightly lower in the early seventies. The combination of youth of both parties, premarital pregnancy and relatively low economic status of husband seems to have offered the greatest threat to the survival of marriage.[27]

III.27 Australian data, available for the first time in 1977, on the interval between date of marriage and date of final separation, relate only to dissolutions under the Family Law Act and so are, as yet, confined to the years 1976 and 1977; in 39.6 per cent of divorces in 1976 and in 36.9 in 1977, separation occurred in the first five years of marriage; 22.5 and 24.2 per cent at duration 5 to 9; 13.6 and 14.9 per cent at duration 10 to 14 years. The median marriage duration before separation was 6.9 years in 1976 and 7.4 years in 1977. These data will increase in value as they become available for additional years, as measures of the trend of effective duration of marriage at the time of breakdown.

[26] Thomes and Collard (1979), pp. 71-80; *The Finer Report* (1974), pp. 129-134; Glick and Norton (1977), pp. 15-16.
[27] Thomes and Collard (1979), *loc. cit.*

III.28 It has been estimated that, if the duration—specific divorce rates (that is, divorce rates by number of years of marriage) of 1971 were to persist indefinitely, 15 or 16 per cent of all Australian marriages would end in divorce;[28] and one-quarter would end in divorce if very recent rates obtained.[29] Even this second estimate is small compared with the situation in the United States where the comparable figure was 40 per cent.[30] The assumption of the continuation of the present duration—specific rates is a point that cannot be resolved now. Age at marriage is increasing, marriages that are being deferred may never take place, by choice or otherwise, and *de facto* relationships may increase. To the extent that that happens divorce may increase. However, marriage levels are still very high by historical standards.

III.29 The age of husbands and wives at divorce in recent years is shown in table III.7. The median age of husbands at divorce declined from 1972 to 1975, fell rather steeply in 1976 and rose again in 1977, when it was 36.1 years. The median age of wives at divorce declined in the period and rather less steeply in 1977 than earlier; in 1972 the median was 34.0 years and in 1977 33.0 years. The decline in median age at divorce is reflected in the growing proportions of men and women who divorced before age 25 years. The age groups 25 to 29 years continued to be the one in which

most divorces took place. The increase in divorce shown at ages under 25 years and to a small extent at 25 to 29 years was offset by decreases in divorce in the age groups 40 to 44 years and 50 to 54 years. From Australian Bureau of Statistics data tabulated separately for the age groups below 25 years we know that divorces of teenage women constituted about one half of one per cent of all divorces in 1976 and 1977, equalling the figure for 1974; in other years the rate was lower again. In the age group 20 to 24 years, the proportions of divorcing women in 1976 and 1977 were 13.4 and 14.3 respectively, both up from 11.5 per cent in 1974 and 1975. The age pattern of divorce meant that many of those who were divorced were young enough to remarry and many of them did so, as the next section reveals. There was little doubt that the breakdown of their marriages did not deter most of them from remarrying if the opportunity arose.

[28] Day (1976).
[29] Caldwell (1979).
[30] Glick and Norton (1977), p. 37.

TABLE III.7 Ages of Parties at Decree Made Absolute Percentage Distribution 1972 to 1977.

Year of dissolution	Age group (years) Under 25	25–29	30–34	35–39	40–44	45–49	50–54	55–59	60 and over	Total number	Median age
					Husband						
1972	3.7	20.4	19.0	14.8	13.4	11.8	8.1	4.5	4.2	15,655	37.3
1973	3.8	20.7	19.3	14.3	12.6	12.0	7.9	4.6	4.0	16,196	37.0
1974	3.7	20.5	20.1	15.2	12.1	11.5	7.8	4.6	4.2	17,688	36.8
1975	4.1	21.1	20.4	15.9	11.5	10.4	7.5	4.2	4.5	24,257	36.3
1976	5.6	21.4	19.1	14.3	11.3	10.4	8.0	4.8	4.9	63,230	33.6
1977	6.1	20.7	19.7	14.7	11.3	10.1	7.8	4.7	4.8	45,150	36.1
					Wife						
1972	11.6	24.7	17.0	13.3	11.8	10.1	6.2	3.0	2.2	15,655	34.0
1973	11.6	24.8	17.9	12.6	11.1	9.4	6.3	3.2	2.3	16,196	33.7
1974	11.2	25.1	18.4	13.5	10.7	9.2	6.1	3.1	2.5	17,688	33.7
1975	11.7	25.6	18.7	13.9	9.9	8.6	5.9	3.1	2.6	24,257	33.4
1976	13.8	24.3	17.8	12.8	9.8	8.4	6.3	3.5	3.0	63,230	33.1
1977	14.8	23.0	18.7	13.0	10.1	8.1	5.8	3.3	2.9	45,150	33.0

Source: Australian Bureau of Statistics, *Divorces*, 1977, Cat. No. 3307.0.

III.30 An aspect of divorce that is of demographic and social concern is the number of children involved in divorces. Divorcing women in Australia have been less fertile than all women[31] and this is still the case though the differences may have been narrowing because of the long-term decline in fertility which has reduced the average size of families so greatly. However, the increasing interval between marriage and first birth may further reduce the fertility of divorcing women. Table III.8 shows an increase in the number of children involved in divorce from 1971 to 1977, from 18,000 to 58,000, with the year 1976 marked by the highest number (74,000).

Table III.8 Decrees of Dissolution: Number of Children and Percentage Childless, 1971 to 1977.

Year	Total dissolutions	Total children	Ave. issue	Total childless
1971	12,947	18,451	1.4	32.5
1972	15,655	22,172	1.4	33.2
1973	16,196	23,078	1.4	32.4
1974	17,688	25,505	1.4	31.7
1975	24,257	34,992	1.4	32.4
1976	63,630	73,645	1.2	37.3
1977	45,150	57,878	1.3	36.3

Source: Australian Bureau of Statistics, *Divorces*, 1976 and 1977, Cat. No. 3307.0.

[31] Day (1976), pp. 64-65; *The Borrie Report* (1978), p. 30.

Amongst the couples divorcing, the proportion childless was higher than in all marriages, remaining slightly under one third up to 1975 but rising to over 37 per cent in 1976 and over 36 per cent in 1977, whereas the 1976 census data showed around 12 per cent childless amongst all married women aged 15 and over. The 1976 census data on numbers of children borne by married women indicated an average issue of 2.2 children whereas table III.8 shows an average issue of 1.2 children to divorcing couples in that year, down from 1.4 children in the preceding years. This result is consistent with that of Caldwell *et al.* who noted[32] that fertility of divorcing women was 60 to 70 per cent of that of all married women.

Remarriage

III.31 It was observed above that the increased incidence of divorce had contributed to the decreased proportions currently married in 1976 but that remarriage had had the effect of counteracting some of the decline in the proportions in existing marriages. Remarriage after divorce had been increasing substantially both in absolute numbers and as a proportion of annual marriages and most marriages above age 30 years in 1976 were remarriages.[33] Because of the relatively young age at divorce most of those who divorced remarried and the proportion of those divorced before 30 years who remarried was as high as 80 per cent within six years of divorce. The numbers of males remarrying in the 1970s was somewhat higher than that of females and they both constituted fairly important proportions of total marriages in each year, especially from 1975 onwards when the percentages were as follows:

	1975	*1976*	*1977*	*1978*
Bridegrooms	10.3	17.6	19.4	19.5
Brides	9.9	16.5	19.3	18.5

In 1978 there was a decline in the numbers of males and of females who remarried, perhaps because of the decline in the number of divorces in 1977 and 1978 and/or because of some of the same factors as had led to the increase in age at first marriage.

[32] Caldwell, McDonald and Ruzicka (1978).
[33] *The Borrie Report* (1978), p. 32.

III.32 The relatively young age of the divorced women meant not only that they remarried but that they helped to sustain the number of births in a period of falling marital fertility.[34] However, they have constituted only small proportions of each age group of ever married women recorded at the censuses, the proportion exceeding 2 per cent only at ages 40 and over in 1971; in 1976, though the proportions had increased, *the impact was still only moderate.*

TABLE III.9 Divorced Women as a Percentage of Ever Married Women by Age Censuses, 1954 to 1976.

Age	*1954*	*1961*	*1966*	*1971*	*1976*
15–19	00.2	00.1	00.2	00.2	00.4
20–24	00.3	00.3	00.3	00.6	1.8
25–29	00.9	00.8	00.8	1.3	3.2
30–34	1.5	1.2	1.2	1.7	3.8
35–39	1.9	1.8	1.6	2.1	3.9
40 & over	1.6	1.8	2.0	2.4	3.2

Source: Australian Bureau of Statistics.

The Widowed

III.33 Demographically the widowed population has had less effect than the divorced because the expectation of life is high and few people die in the young adult ages or in middle age. The numbers of widowed men and women have been much smaller than the numbers of divorced persons remarrying and the median age at remarriage has been considerably higher: 58.5 years for men and 51.8 years for women. Their impact in sustaining the proportions married has therefore been relatively slight and *concentrated in the older age groups. However, the widowed together with the* divorced . . . to the extent that they do not remarry . . . are a vulnerable group especially when they have dependent children and try to cope as 'lone parents'. Further reference is made in the next chapter.

[34] *The Borrie Report* (1978), p. 32.

Marriage and Divorce amongst the Overseas Born and the Australian Born

III.34 The greatly increased flow of migrants into Australia after World War II raised the number of overseas born to 2.6 million in 1971, constituting 20 per cent of the population. Of the overseas-born in Australia, 42.2 per cent were from the British Isles; 22.6 per cent from Northern and Eastern Europe; 20.9 per cent from Southern Europe; 7 per cent from various parts of Asia; the small remainder came from North America, New Zealand and the Pacific region.[35]

III.35 Migrants arriving in Australia in the post-war period have tended to have marriage patterns broadly similar to those of the Australian population as a whole, either on arrival or fairly soon after arrival.[36] However, in evidence presented to the Royal Commission on Human Relationships, C.A. Price noted some differences in 1971 between Australian born and overseas born men and women aged 25 years and over in the proportion who never married.[37] Data presented in table III.10 show generally higher proportions never married amongst Australian born men than amongst

men born in the British Isles, the Netherlands, Italy and Greece. Amongst women, there were a number of groups born overseas with relatively low proportions never married, the lowest being Italy, Poland, the Netherlands, Yugoslavia and Greece. The data relating to divorce and separation illustrate also the tendency of Italians and Greeks towards low rates of divorce and separation as compared with the Australian born and with other migrant groups.

[35] Family Law Council (1978), p. 11, citing evidence from C. A. Price, Australian National University.
[36] *The Borrie Report* (1975), vol. 1, p. 61.
[37] Evatt, Elizabeth (1977), vol. 5, Annexure VI D, pp. 147-156.

TABLE III.10 Marital Status of the Population Aged 25 Years and over by Birthplace and Sex, Australia, 1971.

Birthplace	*Per Cent*			
	Never married		*Divorced/separated*	
	M	F	M	F
Australia	12.7	8.2	4.3	4.7
New Zealand	17.6	11.3	6.2	6.1
British Isles	9.5	5.7	4.0	4.1
Germany	15.0	4.2	4.8	6.2
Netherlands	8.5	3.1	3.3	3.4
Poland	12.4	2.4	6.7	5.3
Yugoslavia	14.0	3.1	3.8	3.7
Italy	9.5	2.1	1.6	1.3
Greece	9.8	3.2	1.3	1.5
Malta	12.4	4.2	2.1	2.1
Other Europe	16.0	4.0	6.8	6.3
Other countries	16.4	8.1	3.5	4.1
Total	12.1	7.4	4.2	2.3

Source: 1971 census data, cited by C. A. Price in evidence to the Royal Commission on Human Relationships.

III.36 These patterns of marriage, divorce and separation reflect the religious values of the Southern Europeans and the socio-cultural characteristics of their countries of origin. In particular, Southern Europeans have a very close-knit family system in which the head of the family plays a strongly authoritarian role and is responsible for maintaining the traditional values regarding chastity of daughters before marriage and the sanctity and permanence of marriage. These attitudes underlie the fact that, though intermarriage is common between the Australian born and migrants from Northwest Europe, particularly from the United Kingdom, and occurs to some extent also amongst Eastern Europeans and the Australian born, it is unusual for Italians to marry outside their own group and Greeks do so even more rarely; where intermarriage does occur it is usually men rather than women who marry out. Parents appear to find it increasingly difficult to insist on strict adherence to the cultural and religious standards of their place of origin and the conflict of cultures is hard on both parents and children.[38]

[38] *Ibid.*

IV. THE FAMILY

Attitudes to Family Formation

IV.01 The marriage patterns that have been in operation in Australia together with the patterns of childbearing have been such that the great majority of adults and children belong for some considerable part of their lives to traditional, formally constituted families. Despite the changing standards of the times, the probability that *de facto* union have increased, and the fact that numbers of children are conceived outside marriage, it still appeared from the evidence of surveys conducted as part of the Australian Family Formation Project[39] that, when the question of having children was considered, there was strong support from young single people for formal marriage as the proper background for the protection and nurture of children.

IV.02 Moreover, although there were fears among some respondents that marriage might constrain personal development, nearly all respondents felt that ultimately there was little alternative to the family and to legal relationships, but marriage should be entered into when the partners were sufficiently mature and knew each other sufficiently well for the relationship to be a stable one that would endure.[40] There were mixed feelings about *de facto* marriage; young males gave it considerable support but only as an interim condition when young, whereas young women thought it unsatisfactory because of the risk of reduced incentive to make the relationship work. Evidence from the Melbourne Fertility Survey, also part of the Australian Family Formation Project, suggested that only a negligible proportion . . . less than one per cent . . . of married women would choose to remain childless and at the most three per cent would consider one child as an 'ideal' family size.[41] That 'ideal' was two children for most respondents.[42]

[39] Caldwell *et al.* (1976), chapter 3.
[40] *Ibid.*, pp. 59-60.
[41] Ruzicka and Caldwell (1977), p. 287.
[42] Ware, Helen (1973), pp. 309ff.

IV.03 Such attitudes had contributed to the changes in marriage patterns described in the preceding chapter, and to the decisions on family size to which further reference is made below. The overall situation as summarised by the National Population Inquiry[43] was that 'more than nine out of ten Australians will marry at least once in their lifetime and some five-sixths of all Australian babies are both conceived and born in wedlock, according to the patterns of nuptiality and fertility prevailing in this country'.

IV.04 Examination of the trends and patterns of family formation in Australia is limited by the availability of data and the lack of comparability of definitions of the family. Research on the family was rare until recent years and there are many areas where the need for information is urgent. Patterns of family formation cannot be traced satisfactorily from annual data because the number of marriages in a year (or other period) and the number of nuptial first births taken separately yield questionable answers. What is needed is the experience of groups of women (or couples) married in a given year (that is, marriage cohorts), by age of wife, and the timing of the first birth after marriage and later births to the marriage (see Annexure 1). Following the cohorts through the various durations of marriage will, of course, yield a picture of their family-building behaviour and, if a given cohort has been married a sufficient number of years, a picture of the completed family size. Both *The Borrie Report* and Ruzicka and Caldwell in *The End of Demographic Transition in Australia*[44] have analysed completed fertility by year of birth and by year of marriage in Australia, from which emerge points of fundamental importance in the history of family-building patterns. However, the results are rather complex to present in convenient form here. Unfortunately, too, the changes that have been occurring in the 1970s and the recency of the Family Law Act mean that relatively new marriages, where the wife is still likely to be in the prime childbearing years, may show in a few years from now a different fertility pattern from that suggested by measures of their fertility in the restricted number of years they have already been married.

[43] *The Borrie Report* (1975), vol. 1, p. 75.
[44] Ruzicka and Caldwell (1977).

Number of Families

IV.05 Family Allowance statistics cited in the Report of the Family Services Committee,[45] gave a total, as for January 1977, of 2,062,574 primary families supporting 4,349,436 children, with an additional 14,755 children being supported by 527 institutions. Ninety per cent of the families had three or fewer children, the two-child family being the mode (table IV.1); that is to say, only 10 per cent of children were in families with more than three children.

TABLE IV.1 Families (a) by Number of Children (b).

	Number of Children				
	1	*2*	*3*	*4+*	*Total*
No. of families	679,044	785,344	391,311	206,755	2,062,574
Per cent	32.9	38.1	19.0	10.0	100.0

(a) Primary families comprised parents (one or two) and children they supported if not employed to do so.
(b) Children were defined as being under 16 years of age; students aged 16 or more but under 25 were classified as children if eligible for assistance.

Source: Australian Department of Social Security statistics.

IV.06 The National Family Survey also provided recent data on the family, collected in 1975 from a sample representing approximately 86 per cent of dwellings in Australia.[46] Rural areas and the Northern Territory were omitted. The number of families estimated from the sample was 1,825,100, which . . . if representative of the whole population . . . would suggest a total of slightly over 2 million families in the country as a whole. The definitions of family and children were different from those applied in the Family Allowance compilation; the family comprised one or both parents, married or not and those under 18 years of age who were neither married nor a parent. The number of one-parent families was estimated at 164,800 or 9.0 per cent of the total.

[45] *The Coleman Report* (1978), pp. 7-8.
[46] English, King and Smith (1978). The survey was carried out by the Australian Bureau of Statistics for the University of New South Wales.

IV.07 Recent censuses provide tabulations of 'families' by class and by certain socio-economic characteristics of the head but the family corresponds not to the traditionally defined family but to the household. Table IV.2 presents data from the 1976 census on families by family class in which those living alone form one 'class'

as do couples with no children present at the time of the census, and various groupings of head, other adults and sometimes children.

TABLE IV.2 Families by Family Class and Sex of Head, Australia, 1976 Census.

Family class	*Males*	*Females*	*Total*
1. Head only	365,586	476,819	842,405
2. Head with children	23,335	137,150	160,485
3. Head with spouse	926,665	28,671	955,336
4. Head, spouse, children	1,216,243	17,365	1,233,608
5. Head, other adults	64,695	136,188	200,883
6. Head, other adults, children	13,237	47,747	60,985
7. Head, spouse other adults	373,405	6,526	379,931
8. Head, spouse, other adults, children	412,492	5,158	417,649
TOTAL	3,395,657	855,625	4,251,282

Source: Australian Bureau of Statistics, *Population and Dwellings: Cross-Classified Tables*, 1976 Census of Population and Housing Cat. No. 2426.0.

The number of households was therefore much larger than the number of families estimated from the surveys referred to above. Points of interest are the predominance of married couples with children present (Class 4); the number of 'lone parents' (Class 2); and the large number of single-person households (Class 1). Interesting as the census data are, they are not comparable with the other available figures.

IV.08 Studies of family formation and family building, involving as they do both marriage and fertility patterns, would be restricted to nuptial fertility if the definition of the traditional, formally-constituted family were strictly applied. However, parents of ex-nuptial children may and often do marry at some time later than the birth of a child and the group so formed would then be regarded as a formal family. Apart from this there appears to be a tendency towards extension of assistance to stable *de facto* families; these may encounter the same problems as do *de jure* families and it therefore seems necessary to take into account the extent of the trends in ex-nuptial births. If known, the number of parents who do not marry but who continue to live in *de facto* unions would give part of the answer to the question of the prevalence of styles of living alternate to the traditional institutions of marriage and family. The total number of live births and of ex-nuptial births is shown in table IV.3 together with the proportion of all births that were ex-nuptial in the years 1931 to 1978. The trends of nuptial and ex-nuptial fertility are discussed in the following sections.

TABLE IV. 3 Live Births and Ex-Nuptial Live Births; and Ex-Nuptial Live Births as Percentage of all Births, 1931 to 1978.

Year(s)	*Live births (1)*	*Ex-Nuptial live births (2)*	*(2) as percent of (1)*
1931–35	112,302	5,241	4.7
1936–40	120,972	5,025	4.2
1941–45	146,886	6,211	4.2
1946–50	181,718	7,349	4.0
1951–55	201,423	7,999	4.0
1956–60	222,459	10,027	4.5
1961–65	232,952	13,798	5.9
1966–70	240,325	18,937	7.9
1971–75	253,436	24,516	9.7
1972	264,969	25,659	9.7
1973	247,670	24,198	9.8
1974	245,177	23,408	9.6
1975	233,012	23,705	10.2
1976	227,810	23,064	10.1
1977	226,291	23,314	10.3
1978	224,181	24,744	11.0

Source: Australian Bureau of Statistics, *Births*, 1977 and 1978, Cat. No. 3301.0.

IV.09 The crucial point in considering trends in family size is that they have been declining for one hundred years. In the last century the average family had seven children; by the middle of this century, the average was less than three children. In the post-war period, the profound changes in marriage . . . early and near universal matrimony . . . brought increased numbers of potential parents to contribute to the numbers of children born. It has been pointed out many times that the 'boom' in births from 1940 was sustained in part by the high proportions married especially of younger women and in part by increases in ex-nuptial births. When measures of fertility were based on the numbers of married women instead of all women in the conventional age groups of the reproductive span, the decline in marital fertility became evident. Fluctuations could and did occur but were attributed to changes in timing and phasing of marriages and births and to general economic movements. The longer term trend was towards a further reduction of completed family size which appears to be continuing in very recent years and which may or may not continue into the future.

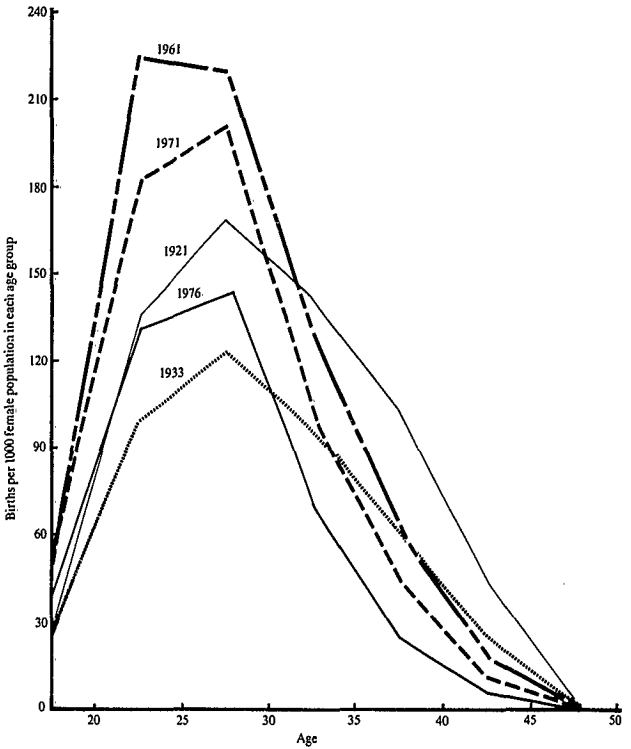
Nuptial Fertility

IV.10 The pattern of annual fertility by age is shown in Figure IV.1 in the form of age-specific fertility rates per 1000 women in the years specified. Figure IV.2 shows live births per 1000 married women in the specified years, by five-year age groups. The diagrammatic form highlights the very considerable differences which emerge in the patterns and levels in the various age groups. In Figure IV.1 the fertility rates were relatively high in 1921, declined in 1933 to their lowest levels (except among women aged over 30 years), rose to their all-time high by 1961, declined again to 1971 and again to 1976. The pattern of fertility by age had been shifting towards the age groups under 30 years as reflected in the continuing concentration in and after 1961 at the

younger age groups (except at ages 15 to 19 in 1976). Fertility rates at ages over 30 years declined in each of the years 1961, 1971 and 1976 shown in the diagram.

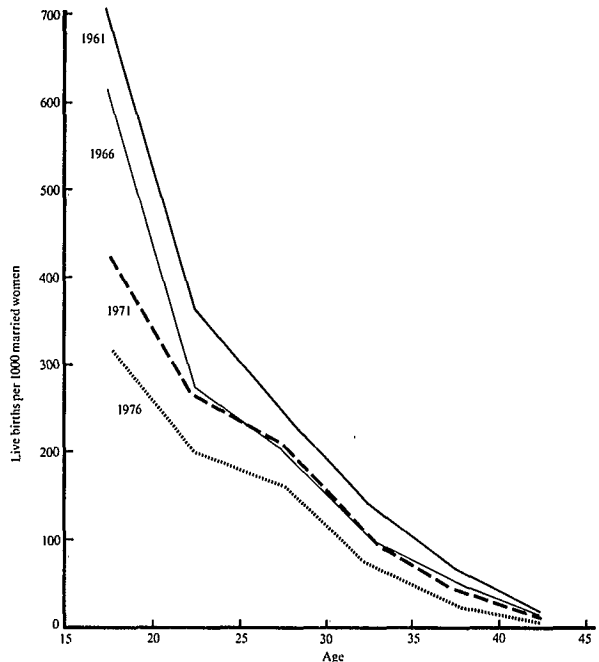
IV.11 In the case of live births to married women by age group (Figure IV.2) the data relate to 1961 and subsequent years, 1961 being notable as the year in which marital fertility rates began to decline. The diagram shows a fall in each successive period especially at young ages; there was a fall also in the number of married women having births of a higher order. The decline seemed to be slowing for women aged 15 and over in 1971 but resumed its course after that.

Figure IV-1: Age-specific fertility rates per 1000 women, selected years since 1921



Source: The Borrie Report (1978), p.36

Figure IV-2: Live births per 1000 married women five-year age groups 1961–76



Source: The Borrie Report (1978), p.38

IV.12 The trends of marital fertility as they affect family size are more directly depicted in the data available from Australian censuses on the average number of children borne by married women of completed fertility, sometimes taken to be married women aged 40 to 44 and sometimes 45 to 49 at the time of the censuses. Data from the censuses of 1947 to 1976 are shown in table IV.4 in the form of average issue to married women in each five-year age group of the childbearing years. As can be deduced from the footnotes to the table there are some differences in coverage of separated, widowed and divorced women, but the first four columns in principle cover all existing marriages. *The Borrie Report* used data from the 1976 Survey of Birth Expectations for comparison over time and for assessing the expectation of future births, as reported by the women included in the survey. The 1976 census data have since become available and are shown in the table.

IV.13 The trends in average issue by age reflect some effects of the depression of the 1930s and of World War II which show in the relatively low average issue of women aged 35 to 39 years in 1947 and 40 to 44 years in 1954. However, because of the declining age at marriage and its effect in raising fertility, younger women were having more children around 1961 and 1966 than were the women of comparable age in 1947. The increase in average issue . . . to which the early marriages of these women contributed . . . brought completed family size up from 2.56 children per family in 1947 to 2.99 children in 1971. At this point, the problem arises of comparison between the data on existing marriages up to 1971 and the data for 1971 and 1976 on all marriages. The 1971 figures of average issue of all marriages and the 1976 Survey data help to bridge the gap between the earlier censuses and that of 1976 but the 1971 data on average issue of all marriage suggest that the difference between the two series . . . existing marriages and all marriages . . . is not likely to be great. However, since a higher average issue would be expected from all marriages than from those of existing marriages, the 1976 averages could be expected to be higher than those of existing marriages at the 1971 census; but in fact they were lower in each age group, though very close at ages 40 to 44 years. It seems that the decline in marital fertility which showed at ages under 30 years in 1971 was being continued in 1976; and average issue of women aged 40 to 44 years was just under three children, down somewhat from the average of 3.12 children reported for all marriages in 1971.

TABLE IV.4 Average Issue, 1947 to 1976.

Age of wife	*Average issue of existing marriages (a)*					*Average issue of all marriages*		
	1947	*1954*	*1961*	*1966*	*1971*	*1971(b)*	*1976(c)*	*1976(d)*
20–24	0.84	0.98	1.09	1.02	0.90	0.94	0.86	0.86
25–29	1.46	1.66	1.95	1.98	1.77	1.82	1.66	1.74
30–34	1.98	2.17	2.50	2.69	2.97	3.08	2.85	2.81
35–39	2.32	2.42	2.67	2.91	2.97	3.08	2.85	2.81
40–44	2.56	2.45	2.65	2.82	2.99	3.12	—	2.97

(a) Excludes women permanently separated, legally or otherwise.
(b) Currently married women, issue from all marriages.
(c) Excluding only divorced and widowed women (Australian Bureau of Statistics Survey Data).
(d) Includes all women ever married (1976 census data).

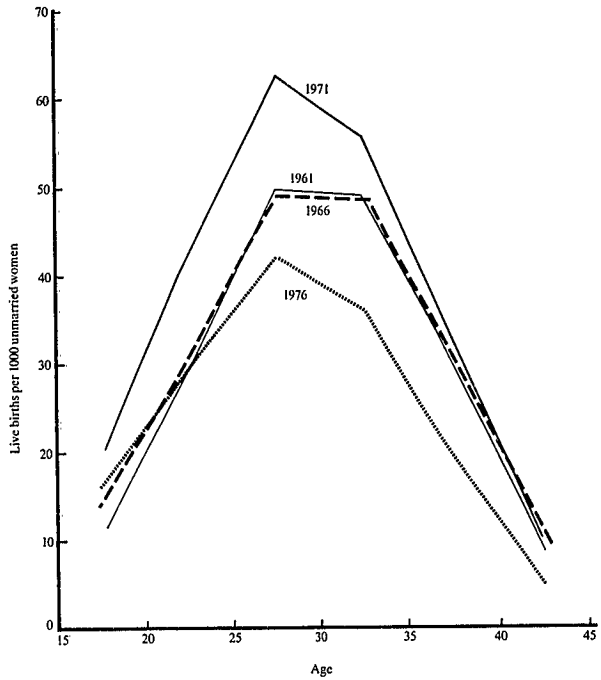
Sources: Australian Bureau of Statistics data 1947 to 1976 and data from Australian Bureau of Statistics Survey of Birth Expectation, 1976, cited in *The Borrie Report* (1978), p. 42. 1976 census data added.

IV.14 As for the future, the 1976 Survey of Birth Expectations which inquired into the total number of children expected by women found that the expected average completed family size was 2.37 children. If achieved this would bring family size down to the lowest level experienced in this country. Nevertheless, the evidence available from the surveys in the Australian Family Formation Project puts the preferred family size even lower at 2 children.[47] If this aim were achieved and maintained it would not ensure the replacement of each generation unless the proportions married were sustained at very high levels and there was no loss by mortality. In recent years . . . 1972 and subsequently . . . the decline in the numbers of births has been such that the net reproductive rate has fallen below unity for three sucessive years, 1976, 1977 and 1978, when it was 0.983, 0.958 and 0.937. That is to say, if the age-specific fertility and mortality rates of the years in question were to apply into the future, the number of women in the reproductive age groups in those years would not be replaced by an equivalent number of daughters in the next generation.

IV.15 From the data of table IV.5 which outlines the distribution of births over the durations of marriage in the period 1921 to 1978, the growing concentration of births into the first ten years of marriage is evident: under 80 per cent of births occurred in that range until the late 1930s, and the proportion in the 1940s and up to the early 1970s remained under 90 per cent. From 1974, 90 per cent or more of births have taken place within ten years of marriage. In other words only some 10 per cent of births occur after 10 years of marriage; within these durations there appears, from the figures for 1976 and 1977, to be a reflection of a deferment of births from the first five years of marriage to the second five years, to allow a period of personal development for the relationship between the couple to mature and in many cases for the wife to consolidate her career prospects with a view to returning to the labour force after childbearing.[48] The median duration of marriage at birth of the first child, among women not pre-maritally pregnant, was 2.4 years in 1978 as compared with 1.2 years in 1963.

[47] Caldwell *et al.* (1976), pp. 90ff.
[48] *Ibid.*, pp. 71ff.

Figure IV-3: Live births per 1000 unmarried women five-year age groups 1961-76



Source: The Borrie Report (1978), p.40

IV.16 The second part of the table shows the changing pattern of family building as first births increased, with some fluctuations, as a proportion of all births, from 32.0 per cent in 1921 to 39.0 per cent in 1978, while second births increased as a percentage of all births from 20.7 to 34.8. Third births increased slightly but higher parity births (fifth and higher birth orders) became increasingly rare. The proportion of married women with no children had also been declining, falling from 18.5 per cent of all women in existing marriages at the 1954 census to 11.8 per cent in 1966.[49] The 1976 data (which refer to all marriages) suggest a proportion of around 12 per cent childless. To throw some light on the question . . . which is an important one in assessing attitudes to family building and to the nature of modern marriage . . . the experience of cohorts of married women at 5, 10 and 20 durations of marriage by year of marriage, is summarised in table IV.6. For brevity, every tenth year-of-marriage cohort has been selected (except for the most recent years), and the selection obscures some of the transition over time in proportions of women with given numbers of children at a specified duration by exaggerating the changes in proportions.

IV.17 Of women married in 1956-57, (who would be at the twentieth duration of marriage in 1976-77), 16.1 per cent were still childless, a level higher than that given by the 1966 and 1976 censuses, but rather lower than the 1954 proportions. In the more recent marriages, the level of childlessness had increased: of the women married in 1966-67 (who would be in their tenth duration of marriage in 1976-77), 18.4 per cent were childless. No clear trend could be discerned from the remaining cohorts which were only two in number.

[49] *The Borrie Report* (1975), vol. 1, p. 85.

IV.18 Of the women married in the 1970s, only four cohorts and five durations could be examined when these calculations were made in 1978, but their recency gives them special interest. The proportions with no children after five years of marriage had reached 30.0 per cent only in one earlier cohort, namely the marriages of 1940-41 at the same duration (not shown in the table). In marriages of 1971-72 and the following two years, the proportions were 31.6, 34.4 and 37.1 per cent: very high levels and higher in each successive year. The next few years will show to what extent the births have been postponed or cancelled: in view of the growing concentration of childbearing into the fifth to tenth durations of marriage (See table IV.5) no doubt numbers of first births will occur to these childless women.

IV.19 The proportion of marriages with specified numbers of children born by the tenth duration of marriage is a fair indication of the probable completed family-size pattern, as over 90 per cent of births occur by then. The data of table IV.6 for the tenth duration show the increasing importance of the two-child family and its predominance, especially among those married in the sixties; 39.1 per cent of children of the most recent marriage cohort (marriages of 1968-69) were in two-child families; 21.4 per cent were in three-child families but the proportion was declining; 13.6 per cent were in one-child families down, somewhat from earlier experience and with some recent fluctuating movements and an unclear direction. All higher birth orders were of diminishing weight. The picture confirms that given by the annual data on timing of births and the shift towards smaller completed family size (table IV.5).

TABLE IV.5 Percentage Distribution of Marital Confinements by Mother's Duration and Parity, Selected Years 1921 to 1978.

Duration of marriage (years)	*Years*																	
	1921	*1925*	*1929*	*1932*	*1934*	*1938*	*1940*	*1942*	*1946*	*1951*	*1956*	*1961*	*1966*	*1971*	*1974*	*1976*	*1977*	*1978*
Under 5	49.3	50.7	53.7	53.1	53.5	60.2	61.2	60.9	55.1	58.0	54.7	55.3	59.2	60.9	61.5	58.1	56.1	54.7
5– 9	27.0	25.3	25.8	25.4	25.8	22.2	22.5	24.0	29.3	26.9	29.6	27.6	25.9	27.3	29.5	33.4	35.0	36.2
10–14	14.3	14.8	11.8	13.2	12.9	11.1	10.5	9.5	10.6	10.8	11.1	12.2	10.1	8.4	6.6	6.5	6.9	7.3
15–19	6.7	6.8	6.6	6.0	5.5	5.0	4.4	4.2	4.0	3.4	3.7	4.0	4.0	2.8	2.0	1.5	1.5	1.4
20+	2.7	2.4	2.1	2.3	2.3	1.5	1.4	1.4	1.0	0.9	0.9	0.9	0.9	0.6	0.4	0.5	0.4	0.3
Mother's parity																		
0	32.0	29.0	31.3	30.5	33.5	38.4	39.4	40.3	37.8	33.3	31.6	31.2	36.0	38.5	39.3	38.5	39.1	39.0
1	20.7	22.8	23.7	24.3	23.9	25.8	26.9	26.7	28.8	30.5	28.9	26.6	27.5	30.1	34.6	36.2	35.2	34.8
2	14.7	16.4	15.4	16.0	15.3	14.2	14.2	14.5	16.1	18.2	19.3	19.1	17.4	16.9	15.8	16.5	17.2	17.6
3	10.8	10.7	10.4	10.2	9.8	8.1	7.7	7.7	8.0	8.8	10.3	11.3	9.3	7.8	6.1	5.5	5.5	5.7
4	7.3	7.1	6.8	6.6	6.1	5.0	4.4	4.2	4.0	4.1	4.9	5.8	4.7	3.4	2.2	1.8	1.7	1.7
5	5.2	4.9	4.4	4.5	4.1	3.2	2.8	2.4	2.2	2.0	2.4	2.9	2.4	1.6	1.0	0.7	0.7	0.6
6+	9.3	9.1	8.0	7.9	7.3	5.3	4.6	4.2	3.1	2.6	2.6	3.1	2.8	1.7	1.0	0.8	0.3	0.6

Source: Ruzicka and Caldwell (1977), and Australian Bureau of Statistics, *Births*, 1976 to 1978, Cat. No. 3301.0.

TABLE IV.6 Family Size at Selected Durations of Marriage (per 1000 weighted marriages).

Marriages of:	Number of children born to the marriage							
	0	1	2	3	4	5	6+	Total
				MARRIED 20 YEARS				
1920–21	149	258	152	172	108	66	95	1,000
1930–31	194	180	235	157	109	51	74	1,000
1940–41	221	147	243	181	103	50	55	1,000
1950–51	170	139	224	199	129	71	68	1,000
1954–55	185	107	208	214	153	70	64	1,000
1955–56	170	132	213	223	153	66	43	1,000
1956–57	161	123	213	231	152	65	55	1,000
1957–58	166	124	219	234	146	64	47	1,000
				MARRIED 10 YEARS				
1920–21	155	275	187	191	112	54	26	1,000
1930–31	204	215	278	163	87	35	18	1,000
1940–41	229	179	293	184	78	26	11	1,000
1950–51	179	157	269	216	114	44	21	1,000
1960–61	152	144	292	252	111	35	14	1,000
1965–66	174	138	357	234	77	16	4	1,000
1966–67	184	139	365	225	66	14	7	1,000
1967–68	183	141	381	220	60	14	7	1,000
1968–69	193	136	391	214	54	10	2	1,000
				MARRIED 5 YEARS				
1970–71	285	310	342	56		7		1,000
1971–72	316	301	326	52		5		1,000
1972–73	344	296	305	50		5		1,000
1973–74	371	289	289	47		4		

Source: Spencer, Geraldine. *Fertility of Australian Marriages*, Demography Research Paper, Australian Bureau of Statistics (1979).

Ex-Nuptial Fertility

IV.20 The course of ex-nuptial fertility in Australia has been such that live births to unmarried women constituted around five per cent of all live births in the 1930s, 1940s and 1950s and then increased rather slowly to almost ten per cent in the early 1970s when the level was back to that of the 1920s. The numbers, however, had reached their peak in 1972 at 25,659 (see table IV.3); it was in the previous year that total live births had reached their peak at 276,361, after which they declined to 244,181 in 1978. While the decline in all live births continued through 1978, the trend of ex-nuptial births fluctuated somewhat, but in a downward direction, until in 1977 and again in 1978 there were increases in the numbers.

IV.21 Because of the correlation between youth and ex-nuptial pregnancy, the data are more meaningful when expressed as age specified rates. Figure IV.3, showing ex-nuptial births as rates per 1000 unmarried women by five-year age groups from ages 15 to 49 years, makes evident the concentration of ex-nuptial births in the younger age groups and the steep increase in the rates for those ages up to 1971, after which they fell to 1976, though not quite to the levels of the 1960s. Amongst older women, the age-specific rates of ex-nuptial births declined in 1976 to levels lower than those in any other years shown.

Ex-Nuptial Conceptions and their Outcome

IV.22 A feature of the recent changing pattern of nuptial and ex-nuptial childbearing is that growing proportions of young pregnant women keep their child and remain unmarried. (Table IV.7). There have, of course, been many cases in which a decision to marry followed from the pregnancy and resulted in nuptial confinement, and the question is why should many young women now elect to bear a child outside of marriage. No doubt they are influenced by the less stringent attitudes of parents and of society in general in matters concerning the style of life.[50] A similar phenomenon was noted in the United States of America and persisted in California even after the legalisation of abortion, and raised the same question of the reasons which underlie such behavioural changes and what the future trends might be.[51]

[50] Caldwell *et. al.* (1976), chapter 1.

TABLE IV.7 Proportion of Non-Marital Pregnancies Resulting in Nuptial Confinements.

Year	Age of Non-married women												
	16	*17*	*18*	*19*	*20*	*21*	*22*	*23*	*24*	*25–29*	*30–34*	*35–39*	*40–44*
1947	45	51	50	49	47	43	38	32	30	24	16	12	11
1971	34	38	38	37	32	28	24	20	17	12	9	6	5

Source: The Borrie Report (1975), vol. 1, p. 78.

IV.23 The association between premarital pregnancy, youthful marriage and divorce was noted in chapter III with a further association between these and relatively low economic status of the husband. The latter is presumably an intensifying factor in a situation where parenthood may put too much additional strain on a husband and wife still in their teens and too young to have solved the problems of personal adjustment or of financing housing and other living costs. It has been shown[52] that when both partners were aged under 19 years, 86 per cent of brides married in 1971 were pregnant, and about three quarters in 1971 and 1972 (table IV.8). When the bride was aged 19 but the husband older, the proportion of pregnant brides fell markedly. When both were older the reduction in pregnancy of the bride was much intensified, until less than ten per cent were pregnant when both partners were aged 23 years or over.

[51] Sklar and Berkov (1974), p. 89.
[52] Ruzicka and Caldwell (1977), p. 283.

TABLE IV.8 Pre-Marital Pregnancies by Age at Marriage of Bride and Bridegroom. Marriage Cohorts of 1970–1972.

Age of Bride:	Under 19				19–20			21–22			23–44
Age of Bridegroom:	Under 19	19-20	21-22	23+	19-20	21-22	23+	19-20	21-22	23+	23+
Year of marriage:	*Percentage of premaritally pregnant brides*										
1970	82	60	42	32	36	19	16	25	11	10	9
1971	76	56	38	31	33	18	16	23	11	10	9
1972	75	53	35	28	29	15	14	21	9	9	8

Source: Ruzicka and Caldwell (1977), p. 283.

Differentials in Family Building Patterns and Family Size

IV.24 As might be expected, the overall levels and patterns of childbearing described above varied as between sub-groups of the population according to a number of geographic, socio-cultural and economic characteristics of the sub-groups. It is not intended to examine the effect of all these influences but rather to summarise, very briefly, the main tendencies and to elaborate a little on a very few differentials of special relevance to family-building patterns and family size in the most recent decades.

IV.25 There have been differences between urban and rural residents, between adherents of different religions, between groups of differing educational level, occupation, employment status and social class as well as between groups of different socio-cultural background. There have been a number of demographic studies of the effect of these and related influences on fertility and size of completed family: the tendency over time has been for the differences . . . as measured by average number of children born into the family . . . to diminish and in some cases to disappear. There have been differences in the time at which convergence has been achieved, and some differences remain. However, all sub-groups in the population were moving towards the small family norm with reduced proportions of families of larger size as well as of childless and one-child families and with most families having two, three or, until recent decades, four children.[53] The most persistent differential has been the higher average issue of rural families among whom three children was the model family whereas for metropolitan families it was two children.[54] The Melbourne Survey of the Australian Family Formation Project found marked differences according to religion, country of origin and education in attitudes to family size,[55] which are discussed below in respect of actual family size. Labour force participation of wives is another highly significant influence in this matter.

(a) Family Size by Occupation, Education and Religion.

IV.26 Table IV.9, from The *Borrie Report*, is presented with a view to illustrating the effects of occupation, education and religion on average issue. The data which relate to wives aged 35 to 39 years at the 1966 census, show that average issue was highest where the husbands were in rural occupations and where the wife was Catholic; the next highest group was that comprising husbands in professional or

managerial occupations and with Catholic wives, and the lowest average issue was found where the husbands were craftsmen or foremen and the wife Catholic. In the case of non-Catholic wives, average issue was highest where the husbands were in rural occupations and lowest where the husbands were shop assistants or clerical workers.

[53] Ruzicka and Caldwell (1977), pp. 231-235.
[54] (1975), vol. 1, p. 57.
[55] Ware, Helen (1973).

TABLE IV.9 Average Issue of Wives Aged 35-39 Years, Census 1966.
(a) By Occupation of Husband and Religion of Wife
(b) By Education and Religion of Wife

	Religion of Wives		
	Catholic	*Other Defined Religions*	*Total*
(a) *Occupation of Husband*			
Graziers, wheat & sheep farmers	4.08	3.24	3.40
Other farmers	3.81	3.37	3.47
Farm and rural workers	3.87	3.56	3.63
Upper Professional	3.75	2.76	2.93
Lower Professional	3.26	2.63	2.74
Managerial	3.24	2.66	2.77
Clerical workers	3.17	2.50	2.66
Shop Proprietor	3.03	2.70	2.77
Shop Assistants	3.02	2.55	2.66
Personal, Domestic	3.05	2.75	2.83
Armed Services, Police	3.21	2.76	2.88
Craftsmen, Foremen	2.95	2.70	2.97
Operatives	3.06	2.90	2.95
Drivers	3.19	2.95	3.02
Miners	3.29	3.14	3.17
(b) *Education of Wives*			
University	3.50	2.70	2.74
Other Tertiary	3.49	2.70	2.80
Matriculation	3.12	2.62	2.72
Intermediate	3.15	2.66	2.77
Some high school and primary	3.17	2.91	2.98
Nil, or not stated	3.59	3.29	3.38

Source: The Borrie Report (1975), vol. 1, p. 57.

IV.27 Average issue was higher whenever the wife was Catholic and whatever the occupation of the husband, as compared with wives belonging to other religions. In respect of education, higher average issue was observed amongst Catholic wives than non-Catholic wives whatever the level of education, and the highest average issue was amongst Catholic wives with tertiary education. Again, however, it must be noted that family size was declining . . . amongst non-Catholics in general and amongst Catholics, particularly in the younger age groups . . . and the average issue of wives aged 35 to 39 years did not differ very greatly by religion: 3.18 children amongst Catholics, 2.82 amongst non-Catholics and 2.91 amongst all wives.

(b) Labour Force Participation and Family Size of Australian-Born and Overseas-Born Wives

IV.28 Differentials in family size and their relation to married women's participation in the labour force constitute one of the most important issues of contemporary life, modifying the labour market itself, affecting the roles and functions of husband and wife within marriage and within the family in general, altering consumption patterns (generally in an upward fashion) and raising expectations for the future of husband and wife for themselves and most of all of their children.

IV.29 Within the total Australian population average issue of women who work has been lower than that of women who do not work: amongst women aged 35 to 39 years in 1971, women who worked had an average of 2.67 children whereas those not in the labour force had an average of 3.16 children. The difference appears also among women aged 40 to 44 years and 45 to 49 years (table IV.10). There is some speculation amongst demographers on the operative factor here: do women have fewer children because they work or does the fact that they have fewer children enable them to work? This is one of the many aspects of marriage and child-bearing which require investigation.

IV.30 In general, the overseas born population has differed from the Australian born population in respect of the proportions of married women who work and in respect of family size. The difference in family size is evident in table VI.10: overseas born wives had fewer children than Australian born women in each of the age groups shown (representing near-complete or completed fertility), whether they were in or not in the labour force. At ages 35 to 39 years, average issue of Australian and Overseas born wives in the labour force was 2.82 and 2.40 children respectively; for wives not in the labour force, the figures were 3.26 and 2.88 children.

TABLE IV.10 Fertility Differentials by Labour-Force Status of Wives, 1971 Census.

Labour force status	*Average issue of existing marriages only*		
	Age of Wives		
	35–39	40–44	45–49
In the labour force	2.67	2.69	2.56
Not in the labour force	3.16	3.20	2.97
Australian born wives			
In the labour force	2.82	2.79	2.65
Not in the labour force	3.26	3.25	2.99
Overseas born wives			
In the labour force	2.40	2.47	2.38
Not in the labour force	2.88	3.02	2.91

Source. Australian Bureau of Statistics 1971 Census, Unpublished tabulation no. SP106, cited in *The Borrie Report* (1978), p. 49.

IV.31 Whether or not wives go to work obviously depends to a large extent on the number of children, if any, and the availability of formal or informal child-care. It also depends, at least amongst women who do not have 'career' qualifications and

aspirations, on the degree of financial need. It is unfortunately the case that migrant women, whose husbands usually are in the less-skilled and less-highly-paid occupations, find it hard to get work in the more remunerative jobs. Language difficulties are an additional problem for migrants and frequently prevent them from seeking or obtaining information on job opportunities or requirements and on services which might be available to them, including child-care.

IV.32 High expectations and difficulties in financing housing and other needs which would help to meet some of their expectations have impelled a higher proportion of migrant women than of Australian born women to find jobs. According to the Labour Force Survey of December 1978, the proportion of Australian born married women in the labour force was lower than that of any overseas born group except Italians, Netherlanders and Poles; the proportion of all women at work amongst the Australian born was lower than any group except Italians, Netherlanders, Poles and Maltese.

TABLE IV.11 Labour Force Participation of Women by Birthplace.

	Labour force participation rates	
	Married Women	*All Females*
	per cent	per cent
Australian born	40.0	44.6
Born outside Australia	46.4	46.9
UK and Ireland	46.2	46.1
Italy	38.5	39.4
Greece	53.9	51.6
Yugoslavia	60.6	56.7
Netherlands	39.9	40.5
West Germany	41.6	45.2
Malta	40.3	39.7
New Zealand	48.1	52.6
Poland	35.6	36.8
Other	48.0	49.7

Source: Australian Bureau of Statistics, Labour Force Survey, December, 1978.

IV.33 The fact that post-war migrants have been characterised by smaller family size than have the Australian born has somewhat surprised demographers, whose observations until the war had accustomed them to the family-building habits of settlers from the United Kingdom and Northern Europe, rather than to the streams from much more varied socio-cultural backgrounds. The older arrivals from Southern Europe . . . Greece, Malta and Italy . . . and the Netherlands alone from Northern Europe . . . had had larger completed families than the Australian born but amongst the younger age groups only those from Malta and the Netherlands continued to have above average family size. Table IV.11, presenting average number of children born to women of completed (or nearly-completed) fertility at the censuses of 1911, 1921, and 1966, reveals the larger family size of Australian born women than of all overseas women; the differences between the selected birthplace categories in the table; and the decline in average issue from the older to the younger ages even amongst wives born in Greece and Italy (especially evident in the figures for ages 45 to 49 at successive censuses) whose religious beliefs might have suggested higher average issue.

TABLE IV.12 Average Issue of Wives by Birthplace 1911–66.

Census year	1911(a)			1921(a)		1966	
Age of Wives	65–69	55–59	45–49	45–49	35–39	45–49	35–39
Australia	7.75	6.78	5.33	4.30	3.44	2.69	2.99
UK & Eire	6.70	6.01	4.97	3.75	2.70	2.49	2.70
Overseas-born (excl. UK & Eire)	—	—	—	—	—	2.60	2.62
All post-1947 migrants	—	—	—	—	—	2.57	2.61
Germany	7.31	7.62	6.52	5.47	3.85	1.93	2.26
Greece	2.00	3.00	6.00	4.05	4.07	3.06	2.38
Italy	5.92	5.14	5.45	5.14	4.18	3.08	2.66
Netherlands	6.67	5.11	2.80	3.29	2.93	3.53	3.21
Total Europe	6.72	6.09	5.04	3.84	2.76	2.57	2.61
Asia	6.41	4.71	4.56	4.53	3.93	2.80	2.85
Africa	5.50	5.66	5.11	3.58	3.50	2.53	2.60
America	5.64	5.79	4.09	3.57	2.53	2.40	2.69
All birth-places:	7.03	6.44	5.25	4.19	3.32	2.66	2.91

(a) Issue from all marriages; for all other censuses Issue from existing marriage only.

Source: The Borrie Report (1975), vol. 1, p. 52.

IV.34 Whether these younger arrivals were adopting the family norm obtaining in Australia or whether they were influenced by the declining fertility in their countries of origin is not clear, but in the second generation the patterns have been reversed: Australian born wives with one or both parents born overseas had more children than wives who were themselves born overseas.

TABLE IV.13 Fertility Differentials of Second-Generation Australian Born and Overseas Born by Birthplace of Wives.

		Average issue of existing marriage only		
		Age of wives		
		35–39	40–44	45–49
	Australian born wives by birthplace of:			
Mother	*Father*			
Australia	Australia	3.12	3.10	2.89
Australia	Overseas	3.01	3.00	2.80
Overseas	Australia	2.98	2.96	2.77
Overseas	Overseas	3.00	2.95	2.76
Total:		3.10	3.07	2.86
	Overseas born wives by birthplace:			
United Kingdom and Eire		2.75	2.83	2.67
Germany		2.35	2.26	2.13
Greece		2.32	2.50	2.81
Hungary		1.94	1.72	1.74
Italy		2.71	2.82	2.95
Malta		3.45	4.18	5.11
Netherlands		3.20	3.37	3.46
Poland		2.29	2.24	2.22
Yugoslavia		2.22	2.30	2.22
Other Europe		2.38	2.35	2.20
Total Europe:		2.64	2.72	2.64
Asia		2.96	3.13	3.05
Africa		2.63	2.73	2.85
America		2.63	2.85	2.64
New Zealand		2.64	2.67	2.51

Source: Australian Bureau of Statistics, Unpublished Tabulations No. SP107 and SP106 cited in *The Borrie Report* (1978), p. 50.

IV.35 Overall, the differences between average family size amongst the Australian born and amongst major groups of overseas born wives were narrowing, and the small family norm was obviously becoming entrenched with the proportion of large families (six or more children) declining over time; all groups, Australian born included, were avoiding childlessness and one-child families; differences persisted between groups in the tendency to have families of four or five children, which was declining amongst Greeks, Italians and Yugoslavs and increasing amongst the Australian born and other groups.[56] The general tendency was for families of two or three children to approach fifty per cent of all families that were completed by about 1971.

(c) Family Size and One-Parent and Two-Parent Families

IV.36 The National Family Survey[57] estimated the number of one-parent families in 1975 as 164,800 as compared with 1,660,300 two-parent families. One-parent families

therefore constituted 9.0 per cent of all families with children aged 17 years or under, as a result of death of the other parent, separation, dissolution of the marriage or because the parent had never married. Other estimates of numbers and percentages vary according to definition and to purpose for which the data were needed: The Commission of Inquiry into Poverty put the number at 160,000 or 10.6 per cent of all families with dependent children.[58] Family Allowance Statistics provide data on recipients of Class A widows' pensions and supporting parents' benefits (begun in 1973 for women and extended to supporting fathers in 1977) which give some measure of the numbers involved, but limited, of course, by the unknown number of lone parents who do not receive pensions or other benefits.[59] Since there is an income test, the numbers who receive widows' pensions presumably cover the least well-off of the lone parents, of whom 16 per cent of females were considered to be below the poverty line and 50 per cent of males to be either very poor or rather poor.[60]

[58] Ruzicka and Caldwell (1977), pp. 244-252.
[57] English, King and Smith (1978).
[58] *The Henderson Report* (1976), p. 198-9.
[59] *The Coleman Report* (1978), vol. 1, p. 18.
[60] *The Henderson Report, loc. cit.*

IV.37 In 1978–79 there were 89,000 women receiving Class A widows' pensions and 59,000 women and 3,000 men receiving supporting parents' benefits. Thus the great majority of lone parents receiving assistance were women. Tables IV.14 and 15 show the distribution by age and marital status of recipients of Class A widows' pensions and of supporting parents' benefits, as well as the numbers and proportions in each category with specified numbers of children.

TABLE IV.14 Selected Characteristics of Class A Widow Pensioners, Australia, 30 June, 1979.

Category		*Per cent*
Age: Under 20 years	200	0.2
20–29	18,400	20.7
30–39	34,600	39.0
40–49	23,700	26.7
50–59	11,500	13.0
60 years and over	300	0.3
De jure widows	23,400	26.4
Divorcees	28,100	31.7
Deserted wives	36,100	40.8
Other	1,000	1.2
Number of widows with:		
No children*	—	—
1 child	35,700	40.2
2 children	31,300	35.3
3 or more children	21,700	24.4
Average number of children per family:	2.0	
Number of Class A widow pensioners	88,700	100.0

Source: Department of Social Security, *Annual Report*, 1978–79 (AGPS, Canberra, 1979), p. 86.
* Class A widows' pension only payable to a widow with children.

TABLE IV.15 Selected Characteristics of Supporting Parent Beneficiaries, Australia, 30 June, 1979.

	Females		*Males*	
Category	*Number*	*Percent*	*Number*	*Percent*
Age: under 20 years	5,800	9.7	0	0.1
20–29	31,800	53.5	420	13.5
30–39	15,400	26.0	1,210	38.7
40–49	5,100	8.7	980	31.3
50–59	1,200	2.1	470	15.0
60–64	0	0.0	40	1.3
65 years and over	0	0.0	0	0.0
Females:				
Unmarried mothers	26,600	44.8	—	—
Separated wives	25,200	42.5	—	—
De facto wives	7,500	12.7	—	—
Males:				
De jure widowers	—	—	650	20.7
Divorcees	—	—	740	23.6
Separated husbands	—	—	1,100	35.1
Other	—	—	640	20.6
Number of supporting parents with:				
1 child	34,700	58.5	1,180	37.7
2 children	15,200	25.6	1,050	33.5
3 or more children	9,500	16.0	900	28.8
Average number of children per family:	1.7		2.1	
Number of supporting parent beneficiaries	59,400	100.0	3,130	100.0

Source: Department of Social Security, *Annual Report*, 1978–79 (AGPS, Canberra, 1979), p. 90.

Deserted wives (including separated wives) were the largest category among widow pensioners (40 per cent) followed by divorcees (32 per cent) and *de jure* widows (26 per cent). The average number of children was 2.0 per family.

IV.38 Amongst recipients of supporting parent's benefits women outnumbered men twenty to one; they were a younger population than the Class A pension recipients and younger than the males receiving supporting parent benefits. Forty-five per cent of these women (or 27,000) were unmarried mothers; 43 per cent were separated; and 13 per cent were *de facto* wives. Most males (35 per cent) receiving assistance were separated 24 per cent were divorced; 21 per cent *de jure* widowers and 21 per cent fell into the 'other' category. The average number of children per family was 1.7 where the supporting parent was the mother and 2.1 where the supporting parent was the father.

IV.39 Comparability of the Family Allowance figure on numbers of children in one-parent families with the number in all families, or in two-parent families, as recorded in the censuses or other demographic enquiries, is limited by the fact that the Family Allowance data by definition exclude childless couples and children aged 16

years or over unless they were students eligible for support. However, smaller family size could be expected amongst the lone parents by reason of their being non-married or no longer married; by reason of the fact that some are still in their prime childbearing years and will perhaps bear more children; and by reason also of the very high proportion of unmarried mothers with only one child. Divorced and separated wives and supporting fathers with an average of 2.0 and 2.1 children respectively were not so exceptional in the circumstances (table IV.16) though certainly with smaller families than had ever married women of completed fertility at the 1976 census: 2.97 children on average.

TABLE IV.16 Class A Widow Pensioners and Supporting Parent Beneficiaries, by Category, by Number of Children Australia, 30 June, 1979.

Category	Ave no. of Children	No. of children 1	2	3	4	5+	Not Stated
		Per cent					
De jure widows and dependent females:	1.8	49	30	13	5	3	—
Divorcees and separated wives:	2.0	38	36	16	6	3	—
Unmarried mothers	1.3	81	14	4	1	1	—
Supporting fathers	2.1	38	34	17	8	4	—

Source: Department of Social Security, *Annual Report*, 1978–79, p. 13.

IV.40 Meanwhile, a comparison of numbers of children in one- and two-parent families in the National Family Survey[61] showed the following proportions of children living in families of different size in the two types of family at the time of the inquiry:

Number of children	One-parent families	Two-parent families
	Per Cent	Per Cent
1	48.3	31.0
2	28.3	35.4
3	14.7	21.6
4+	8.7	12.0
	100.0	100.0

The higher proportions with one or two children (76.6 per cent as compared with 66.4 per cent) support the conclusion that lone parents have smaller families than two-parent families. Even so their problems are severe not only because of the low income of many of them, but because it is difficult for one parent to manage physically if he or she works and/or if illness or other emergencies arise. These are social and economic problems to which all recent commissions and committees have drawn attention, noting that the children in such families . . . like the children of many migrant parents . . . suffer in a number of ways which may have lasting effects on their development. The effects on both parent and child(ren) need investigation.

[61] English, King and Smith (1978), p. 11.

V. THE STAGES OF THE FAMILY LIFE CYCLE AND MARITAL STABILITY.

V.01 The history of the concept of the family life cycle and its advantages in tracing the progression of the family through successive stages of the cycle have been described by Christabel Young,[62] and the technique was applied by her to data collected in the Melbourne Family Survey in 1971. The family cycle approach follows cohorts of couples married in specified years as they proceed to have their first and subsequent births, recording these by their timing and spacing and thus giving a picture of the growth of the family over time. Later changes in the cycle depict the departure of the children from the parental home, leaving the parents alone until the family is eventually dissolved by the death of one partner. It is part of the life cycle concept that there are identifiable stages in the history of families, each stage influencing the events of the succeeding stages, which have been investigated in relation to a number of socio-economic and psychological characteristics.

Stress Points in the Life Cycle

V.02 For present purposes it is the identification by various authors of stress points in the life cycle of the family which is of immediate interest.[63] The stresses did not always involve conflicts of opinion between husband and wife but put strains on the family, by implication mainly the parents, which must have been reflected to some extent in the satisfaction they derived from their relationship. The marriages in most life cycle studies are intact ones, so that what we learn of is the experience of survivors of the hazards identified, important amongst which was the period when the children became independent of the mother (that is, when she would be in her late forties); for the husband, the years close to retirement when job satisfaction was diminishing. The launching of adolescents into adulthood constituted another crisis, in the view of several analysts, and frequently involved conflict of roles in the adolescent. In one instance, the emphasis was put on three points in the family cycle as requiring the greatest adjustment: birth of the first child, completion of schooling of the last child, departure of the last child from home. To these should be added, according to another view, the point at which the youngest child left home for school. Amongst numbers of other sources of stress mentioned in the literature were:

- Decreased marital satisfaction during childbearing and child rearing, followed by increased satisfaction; parenthood gave greater satisfaction when the children were small, and reached a low point when all the children left home;
- Interruption of increase in marital adjustment by arrival of each child;
- Unresolved incompatibilities between the housewife/mother role and the working woman role, leading to numerous crisis situations and decisions that women face during the interaction between their family, education and work.

[62] Young, C. (1977).
[63] *Ibid*, chapter 1 (Literature Review).

V.03 Table V.1, relating to marriages of 1930–39, shows that after an interval of 1.2 years between marriage and first birth, childbearing was completed in 8.3 years; that is to say, on average, childbearing was completed within 9.5 years of marriage. Another 14 years would pass before the children began to leave home and that process

would be completed after another 9.5 years. The total process would take 33 years, after which the couple would be alone until the death of one of them, in the 'empty nest' or post-parental stage.

TABLE V.1 Life Cycle Stages. Melbourne Family Survey, 1971.

Incidence and duration of events	*Melbourne Survey, 1930–39 Marriage Cohorts*
Start of childbearing stage	1.2 years
End of childbearing stage	9.5 "
Start of leaving home stage	23.5 "
End of leaving home stage	33.0 "
Years of childbearing stage	8.3
Years of intermediate stage	14.0
Years of leaving home stage	9.5

Source: Young, C. (1977), p. 166.

V.04 The long post-parental stage is a new phenomenon brought about by the decline in the number of children per family and concentration of childbearing into a short period, together with the decline of mortality, which have extended the period which husband and wife spend together after the children have left home. In Australia the duration of the period among cohorts marrying in the 1940s was expected to be about fifteen years, an increase of twelve years since the experience of cohorts marrying around 1900.[64] Glick and Norton,[65] commenting on the comparable American experience made the observation that the most impressive feature of the changed life cycle was the greatly elongated period between marriage of the last child and death of one spouse, an expansion of eleven years; further, a total of thirteen years (two years before the first birth and eleven after the last birth) in the more than 40 years of the average marriage would be spent by the husband and wife without children. A result of these changes is that the modern family has a three-generation structure, with grandparents, parents and children interacting to a greater or lesser extent depending on location of residence. This to some extent modifies the effect of the small size and simple structure of the nuclear family, often accused of restricting the development opportunities open to children and depriving parents of support in times of need.

V.05 In her analysis of the data of the Melbourne Family Survey in *The Family Life Cycle*, Young derived a typical pattern of timing of events and duration at which they occurred in relation to completed family size. The results are shown in Table V.2 where the figures of average duration or average length indicate stages of the cycle, some of them overlapping. In general, the larger the ultimate family size, the shorter would be the initial childless stage, the shorter the interval between the first and second births, the longer the childbearing period, the shorter the length of the intermediate stage and the earlier the first child leaves home.[66] One and two-child families are completed by 3.8 and 5.7 durations of marriage respectively. The timing of the birth of the last child is important because of its relation to the woman's being able to return to the labour force if she wishes, depending largely on availability of childcare facilities.

[64] *Ibid.*, p. 311.
[65] (1977), pp. 20-21.
[66] *Ibid.*, pp. 173-175.

TABLE V.2 Timing and Duration of Life Cycle Events for Completed Families with One, Two, Three, Four or Five or More Children.

Timing and duration of events (years)	*Completed family size* 1	2	3	4	5
Average duration when 1st child is born	3.8	2.2	1.9	1.5	1.3
Average duration when last child is born	3.8	5.7	8.6	10.6	14.3
Average duration when first child leaves home	27.0	24.4	24.3	23.3	23.0
Average length of child-bearing stage	—	3.5	6.7	9.1	13.0
Average length of intermediate stage	23.2	18.7	15.7	12.7	8.7
Average interval between 1st and 2nd births	—	3.5	2.6	2.3	1.9
Average duration when first-born child leaves home	27.0	24.9	25.0	23.9	23.8

Source: Young, C. (1977), p. 174.

V.06 The life cycle experience of recent marriage cohorts will no doubt differ in a number of respects from that of the 1930–39 cohorts. Other things being equal, further improvements in mortality will be reflected in a longer post-parental period but in addition to that the effects of the changes described in earlier sections of this paper will also be felt. Changes in age at marriage and proportions married, deferment of first and second births,[67] the careful synchronisation of childbearing with women's entrance to, withdrawal from and return to the labour force, will all be reflected in shorter or longer duration of the stages of the life cycle preceding the post-parental stage. Perhaps the main question is what will be the long-term effect of the concentration of childbearing into such a very short period of married life: for a family of two children, childbearing could be completed even earlier than the 6.7 years observed in the 1930–39 marriage cohorts, leaving some five-sixths of the duration of marriage in which the husband and wife may assume other roles than the customary ones, if they so wish.

[67] Ruzicka and Caldwell (1977), p. 293.

V.07 There seems to be no criterion by which we can judge whether these changes are for the better or worse in sustaining the institutions of marriage and the family. They are certainly transforming those institutions and the roles of the parents and children within them and in so doing are achieving a balance between the demographic, economic and social aspirations of the parents for themselves and their children. It may be a continually changing balance or it may produce a more stable situation of a kind we cannot now foresee.

The Life Cycle and the Investigation of Marital Discord

V.08 Meanwhile the problem remains of the stability of marriage and, by implication, of family life. Though life cycle technique has in practice been applied mainly to currently existing marriages, there is no reason why it could not be extended to cover all marriages or even all women aged, let us say, 15 years and over, recording their marital status (including stable *de facto* unions); the timing of separation, divorce and widowhood; the number and spacing of children; other information as required. It is not to be expected that such information could be collected easily or perfectly, but there are precedents for equally controversial surveys:

The Kinsey Inquiry on male sexual behaviour is a case in point. In Australia surveys associated with the Australian Family Formation Project, including the follow-up of the Melbourne Survey in 1977, have investigated pre-marital sexual experience, attitudes to contraception and abortion and the type of contraceptive used amongst young and unmarried males and females. In England a study of divorce was undertaken by the Marriage Research Centre at the Central Middlesex Hospital in London in a sample drawn from a listing of petitioners who obtained a *decree nisi* between September 1970 and March 1972 in a local area of the West Midlands. In addition, a sample of people still in their first marriage was selected from electoral wards in the vicinity of the county court which heard the divorce petitions. Many of the items were non-controversial and, at the pilot stage, it transpired that certain exploratory questions of a 'sensitive' kind could be added if carefully handled: these included questions on sexual satisfaction, pre-marital and extra-marital affairs, pre-marital problems, post-puerperal depression, parental marital status, parental preference, religious adherence and practice. Direct questions were not asked of divorce petitioners on the reasons for their divorce but some conclusions were nevertheless derived indirectly from the information available.

V.09 The analysis presented by Thornes and Collard[68] is not formally of the family life cycle type but could be linked to identified stages of the cycle and used to amplify data in the life cycle form; for example, the data on timing of the start of marital difficulties, on the *de facto* duration of marriage (that is, up to the end of cohabitation), on duration of marriage at separation and at divorce, and on the interval between separation and divorce.

Characteristics of Those Who Divorce

V.10 The conclusions from this study regarding the correlates of divorce are worth repeating in brief, since they may suggest lines of inquiry related to the stress points in the life cycle of the family and lead to a possibly expanded understanding of factors which destabilise marriage and the family; and perhaps of the reasons why some couples divorce and others in similar circumstances do not; and why some couples separate but do not formally divorce. The Institute of Family Studies will presumably interest itself in such questions in accordance with the terms of reference given to it by the Family Law Act.

V.11 The correlates of divorce[69] were organised around the idea that effective communication (defined in a broad way as the total process by which husbands and wives learn to understand each other's needs and expectations) may be fundamental to marital stability. This was considered important in the modern family because the reduction of the extended family to the conjugal family unit was said to have lessened the sources of satisfaction of the individual's emotional needs.[70] If effective communication were not achieved divorce might result since the barriers to divorce had diminished and there were more options to remaining in an unhappy marriage. Women were thought to be more likely than men to suffer from lack of 'affectional rewards' because men had sources exterior to the small family group to affirm their value while women were much more likely to spend their days alone at home with small children and perhaps to seek more reassurance than could reasonably be expected from the husband. Failure to communicate might have its origins in a number of generational, social, cultural or educational factors:

[68] (1979).
[69] Thornes and Collard, *op. cit.*, pp. 139ff.

- dissimilar religious, social or cultural background or too great a disparity in age;
- too short an acquaintance;
- incomplete emotional development, a special example being the teenage marriages which are known to be prone to breakdown, some of the stress being associated with the preoccupation of the young with their own individual needs and consequent insensitivity to the needs of their partners;
- early arrival of children in a marriage, preventing the development of adequate emotional rewards from spouse to spouse even though the children were themselves the source of affectional rewards;
- some external factors such as low income, substandard housing and low educational level;

[70] This contention is disputed by a number of analysts, including Peter Laslett (1972) p. 8, who refers to the extended family as the 'classical family of Western nostalgia' which he argues was not as large or complex in reality as in the ideal.

- dissatisfaction with the sexual side of marriage, especially in the beginning;
- too fast a development of the relationship or stresses in the courtship period perhaps leading to break off and reunion. These seem to be a prelude to instability in marriage, whereas slow development of the relationship, with the minimum of external stress promised a more stable relationship as did a formal engagement and ritual preparation for marriage;
- pre-marital pregnancy, which was most likely to be correlated with divorce when associated with a courtship disruption and a husband in a low economic position. Divorcing women who were pregnant when married seemed to lack parental support for their marriage as compared with women who were continuing in marriage. Parental support perhaps relieved married couples of too high a concentration of their emotional needs on each other;
- expectations which the couple might have of one another regarding role fulfilment. It appeared that men were still generally regarded as the principal material providers, and divorcing husbands were more likely to have been unemployed in the early years of marriage than were husbands in the continuing-married sample. Thornes and Collard noted that research findings of other studies showed greater marital unhappiness among wives who either worked full-time or worked because they were financially obliged to do so rather than through personal choice; this might arise from fatigue or from resentment with regard to marital roles, or from other causes;
- personal vulnerability of one or both spouses which might prevent them from giving or receiving adequate affectional rewards, a condition observed in children brought up in a discordant emotional climate. Children of unhappy marriages often themselves had unhappy marriages;
- parent-child discord, but little is known of how this operated except that many children married to escape an unhappy relationship with parents, only to fail in establishing a stable relationship in their own marriage;
- a desire to remarry. However, the mean interval between separation and divorce was 4.6 years in an English study of 1972 cited by Thornes and Collard[71] and their own study showed an interval of 5.2 years. It is evident that at the time of separation remarriage was not the immediate objective, though many divorced persons do remarry.

[71] *Ibid.*, p. 126.

V.12 Preston and McDonald[72] in a study of divorce in cohorts of American marriages since the Civil War, found that mobilisation for armed service and high unemployment rates in the year of marriage were related to a high proportion of divorces in a cohort; also slow national economic growth between the period before marriage and the post-marital period was associated with high divorce rates in a cohort. Incidentally, this study is interesting for its observations on the merits of cohort rates as compared with rates in specified time periods, the latter being more variable than the former.

Who Does not Divorce?

V.13 The question of corresponding interest at the other end of the scale is who does *not* divorce. Obviously, there are those who cannot do so because the law does not allow divorce; as in Italy, Franco's Spain and some Latin American countries. According to Rheinstein[73] and others, stringent divorce laws, while preventing legal dissolution of marriage, lead to the proliferation of informal unions and to evasive practices by those with money enough to afford them. Chile, Argentina, Brazil, Poland until the post-war period, Sweden before the adoption of new legislation governing marriage and divorce in the Marriage Law of 1920 and Italy, when divorce was officially unavailable, provide instances of these practices. The rich could achieve remarriage legitimately and safeguard family alliances and inheritance of property by so doing, while the poor had to content themselves with consensual unions or a solitary life. There is a residual of this today in those countries where numbers of separated men and women do not attempt to obtain divorce. In fact recent increases in divorce seem to be due in some part to an increased tendency for those who separated to have their marriages legally dissolved . . . and perhaps regularise a *de facto* relationship . . . in keeping with the spread of middle-class values in the more affluent societies of the industrialised countries today and the greater social acceptability of divorce.

[72] (1979).
[73] (1972) Chapters 6, 7, 16.

V.14 In countries which do not permit divorce, measuring the extent of marital breakdown is even more difficult than in countries where divorce and separation give at least some indications of the level. In the case of Italy around the end of the 1960s the rate of separation was 0.70 per 1000 population, higher than the divorce rate in Great Britain, France, Belgium and Poland; one estimate put the number of *de facto* unions at one million and another estimated the number of separated persons at 2.5 million, about one-third of whom had established new illegal families.[74] In Spain, where a draft divorce Bill was recently approved by the Government, an estimated two million Spaniards were either separated or seeking separation or annulment.[75] These examples suggest that the compulsory avoidance of divorce does not achieve the object of preventing marriages from breakdown, though there undoubtedly remain many cases where the marital relationship has broken down but separation has not occurred. Again we come back to the point that we need information on the marital histories . . . preferably of men and women but at least of women because of their childbearing function . . . and preferably in the life cycle form to the extent that this is feasible. As already suggested, the population investigated should include all men and women, aged 15 years and over whether married or not. The Melbourne Family Survey has established some precedents and gained experience that could be put to use in future inquiries in this area.

V.15 Categories of persons who, when divorce is available do not avail themselves of it, or who are unlikely to do so, include those who believe in the indissoluble nature of marriage. The stability of their marriages must surely be shaken at times and personal and other differences must have produced discord, intermittent or continuing. It would be of considerable benefit to such people if their problems were recognised and if help could be offered, through counselling or probably more effectively through family life education. It would be even better if the problems could be prevented or their effect diminished by a general preparation for marriage that would be part of the benefits derived from an affluent and increasingly enlightened society. A modern man and woman may easily spend over 40 years in a marriage and enter it totally uninstructed on the risks, the rewards and the responsibilities. There should be a considered approach to the kind of family life education which could counteract the picture of adult relations, marriage and the adult family gleaned by the modern child from television. Their parents and grandparents in their turn were subject to influences such as those which so incensed the leaders of the women's movement . . . women as a sex symbol, romantic love and glamorous surroundings. Family life education[76] should be an integral part of recreation (songs, drama stories) and of courses in literature and language, biology, home economics, becoming more specialised when being given to adolescents and covering the problems of being adult, choosing a marriage partner, founding a family and developing together with wife or husband and with children. And it could and should help young men and women to make a considered choice of partner and to be prepared to work at the tasks of adjustment and mutual support.

[74] Rheinstein, *op. cit.*, pp. 158-159.
[75] *The Canberra Times*, 7 February 1980, p. 14.

V.16 In the United States of America the highest level of marital stability amongst men aged 35 to 54 years in 1960 and 1975 was observed in the group which had graduated from college or had gone on to graduate school.[77] The relationship between socio-economic status (whether measured by education or income) and marital stability of males was consistently positive. For women the pattern was less clear because of the changing relations between their marriage and career prospects; however, there was a marked improvement in the stability of marriages of women aged 35 to 54 years in 1975 who had pursued their education beyond an undergraduate degree. Rheinstein, emphasising the transformation of marriage in what might, he said, be called 'the great American middle class' saw as its concomitant a greater risk of failure and disappointment. But the 'very development of industrialisation and urbanisation which seems to have brought about that . . . increase in cases of family breakdown is smallest among that group which appears most typically to represent a new age, i.e., that of the college and university graduates'. If certain investigations justified this conclusion, 'it might indicate that the top level of that kind of education which our society has elaborated may develop not only the new demands on marriage but also the abilities to fulfill them.[78]

[76] Rheinstein, *op. cit.*, pp. 429ff.
[77] Glick and Norton (1977), pp. 9-10.
[78] Rheinstein, *op. cit.*, p. 275.

ANNEXURE 1.

A NOTE ON COHORT ANALYSIS.

The transition from the predominance of families with a large number of children to a situation where the majority of married couples have only two or three children cannot be adequately traced from cross-sectional data. This aspect of reproductive behaviour can be more adequately assessed by rearranging the time-period data so that they reflect the experience of new aggregates, **the cohorts**. Two types of cohorts are generally used in demographic analysis of fertility: **birth cohorts (generations)** or aggregates of women born in the same year or small number of sequential years; the **marriage cohorts** or aggregates of women married in the same year or sequential years.

In each instance, cumulative measures of marital fertility may be derived; although the distinction between the two types of cohorts leads to important differences between the measures. The cumulative marital fertility of a birth cohort **(generation)** is an aggregate measure reflecting the reproductive experience of a group of women who were ageing at the same pace but who varied with respect to their age at marriage and, consequently, had experienced different marriage durations when they reached a specified age.

The cumulative marital fertility of a marriage cohort, conversely, measures the achieved fertility of women after the same period spent in marriage; however, because their ages at marriage varied, so did their physiological fecundity at the time of marriage.

The sources of data for calculation of cohort measures of fertility are of two types: retrospective data on the number of children ever born to ever married or currently married women obtained from census returns or sample surveys, tabulated either by age at the time of census (or survey) or year of birth—thus leading to birth cohort measures; or by year of marriage or duration of marriage at the time of census (or survey)—thus generating marriage cohort measures.

ANNEXURE 2.

CURRICULUM VITAE OF AUTHOR

Author	Kathleen M. Jupp
Place of Birth	Sydney, Australia
Nationality	Australian
Date of Birth	19 February 1917

UNIVERSITY DEGREES

Institution, City	*Year of Attendance*	*Degree, Year*
University of Sydney	1935–1937	B.A. (English language and literature) 1938
University of Sydney	1946–1949	Bachelor of Economics 1950
Australian National University	1952–1956	M.A. (Demography), 1958

Experience in demographic and related fields

Title/Position	*Organisation*	*Country of Service*	*Dates*
Retired	—	—	February 1978
Co-ordinator, World Population Conference (WPC) and World Population Year; and then Co-ordinator WPC Implementation	United Nations/ ESA/Population Division	USA	February 1971 February 1978
Regional Adviser, General Demography	UN BTAO, ECAFE/ Population Division	Thailand	July 1968 February 1971
Regional Adviser, Demographic Statistics	UN BTAO ECA/Statistics Division	Ethiopia	March 1961 July 1968
Country Expert (Demography)	UN BTAO/Statistical Training Centre, University of the Phillipines	Philippines	September 1958 December 1960
Census Commissioner	Gov. of Western Samoa (on leave from ANU)	Western Samoa	June 1956 to May 1957
Research in demography	Australian Nat. Uni.	Australia	September 1952 August 1958

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Appendix 4

ABORIGINAL CUSTOMARY MARRIAGE

Paper Prepared by Committee Secretariat

The Aboriginal customary law marriage is not recorded in writing and unless the ceremony takes place within the provisions of the Commonwealth Marriage Act, the marriage is not recognised within the common law system. This has a number of effects. The children of the marriage are recorded for statistical purposes as nuptial children but they are not otherwise recognised as legitimate and do not come within the terms of the Family Law Act. Parties to the marriage are not able to use the common law system to settle matrimonial disputes or deal with matrimonial property. In addition, the parties may fall outside the system of social welfare benefit payments administered generally by the Commonwealth Department of Social Security. There are also problems in relation to the acceptance by younger people of the system of arranged marriages, the custody and adoption of children, inheritance and testator's family maintenance.

Other problems arise because communication between the customary law system and the common law system is complicated by language and cultural problems on both sides. Tribal patterns and tribal norms can require standards of conduct different to those which would normally be expected in the common law courts. For these reasons the question of recognition of traditional marriage is raised. Clearly the recognition of such issues are important to Aboriginal people generally.

In its submission to the Committee the Department of Aboriginal Affairs stated that—

> . . . the Family Law Act is one avenue through which some legal recognition might be given to such marriage. In particular since polygamous unions still occur, s.6 of the Act could be amended to define Aboriginal customary marriage as a marriage for the purpose of the Act. Should this occur Aboriginal customary marriage would, of course, be regarded as having the obligations prescribed by the Family Law Act. In order to ensure that these obligations are imposed only in situations where they are culturally relevant, it has been suggested that recognition might be restricted to those cases where the parties apply to record the marriage.

In evidence, the Department expressed the view that the common law should incorporate Aboriginal law with sufficient flexibility to allow Aboriginal customary law to continue to operate as long as its operation is satisfactory to the persons concerned.

Attention is also drawn to the submission by the National Aboriginal Conference, particularly to the statement that—

> A permanent Committee should be set up selected from various organisations, denominations, Aboriginal and Islander groups. The people seeking divorce must approach the Committee before a case can be heard. The Committee will be able to cool the wrong thinking of the two people.

In evidence both organisations drew attention to problems where there are conflicting interests between Aboriginal customary laws and the common law.

In tribal communities the ability of women to choose marriage partners and the right to receive benefits from the common law system by way of social security seems to be limited. There are pressures within the community for marriage to take place within

certain social groupings determined by the customary law system. The choice of marriage partner appears to be a limited one and in some communities, at least, the group of family from which the choice is to be made is determined very early in life and confirmed at the time of a man's first initiation. A marriage may also be polygamous.

The matter of the removal of the children of broken marriages from tribal communities was raised by the Department of Aboriginal Affairs. The Department stressed that in traditional communities there is a total framework of customary laws governing separation and that traditionally any children remained within the care of the extended family. The Department considered that there is a need for the role of the extended family to be recognised by welfare authorities and that it should be given the responsibility and support necessary to care for children in this situation.

It was emphasised that marriages are contracted differently in Aboriginal society and there can be hardship to Aboriginal people who are traditionally married but whose marriages are not recognised by the common law. It was suggested to the Committee by the National Aboriginal Conference that the Aboriginals most affected by conflicting interests were those living in urban areas. To varying degrees these Aboriginals are drawing away from traditional customs and are often without the traditional support of their communities. Clearly the Aboriginal communities have a need for a continuation of the Aboriginal customary law but depending on a number of facts, such as their remoteness as a community, the type of problems experienced or their experience of the common law system, there are a variety of views on the extent to which and on the manner in which the common law system should complement the Aboriginal customary laws.

The Committee notes that where parties were married under the previous Marriage Act they have the option of applying to the Family Court for relief. Their individual circumstances are now considered within the framework provided by the Family Law Act. Parties married according to customary law are subject to the laws of the States and cannot avail themselves of the provisions of the Family Law Act. The Committee considers that the particular circumstances and customary law obligations of the parties are relevant matters to be taken into account in any action before the Family Court or State courts. It draws attention to the suggestion of the National Aboriginal Conference that committees should be established in tribal communities to counsel couples with marital difficulties. The Committee is of the view that such committees should be established to counsel couples with marital difficulties and that in the event of a court action, a report from these committees should be available to the Family Court or State courts for the court's consideration where such a report is relevant to the action.

Attention is also drawn to the role of the extended family in traditional communities in caring for the children of broken marriages. It is considered that the extended family should be encouraged and supported in this role and that due regard should be had to the nurturing support an extended family can offer a child.

The Committee recognises that there are complex issues relating to the question of the recognition of Aboriginal customary marriage and more broadly to the question of the extent to which the Commonwealth Government should legislate for Aboriginal people in an attempt to pursue a policy of self-management and self-determination. While a discretionary approach may be preferable, in which Australian law intrudes to the least extent possible into Aboriginal customary law, the Committee is also aware of the arguments for a more activist role. One of the real difficulties is the pressure for change and resistance to that change by those who are against intervention of Australian laws into tribal matters. The Committee considers that there has been insufficient evidence on this matter and that further expert evidence and consultation with Aboriginal groups

and organisations would be necessary for a recommendation to be made on the need for the development of a framework of laws to meet the needs of Aboriginal people in this area.

It is noted that the matter of Aboriginal customary law is currently the subject of a reference to the Australian Law Reform Commission. The Commission began its Inquiry in 1977 and the length of time needed by the Commission to deal with the questions involved in that Inquiry is an indication of the seriousness and complexity of the issues involved. The Committee therefore makes no recommendation on the particular matter of recognition of the Aboriginal customary marriage but it is of the view that the findings of the Commission, insofar as they relate to family law matters, should be given careful consideration by the Commonwealth Attorney-General.

Appendix 5.

EXTRACTS FROM TWO OPINIONS BY PROFESSOR P. H. LANE

A DUAL COURT SYSTEM

Extracts from two Opinions provided by Professor P. H. Lane, Sydney University, referred to in paras. 2.35, 2.36 and 2.37 of the Report of the Committee.

First Opinion

1. The conflict between what is a Commonwealth-regulable matter and what is a State-regulable matter in family law might be avoided, it seems to me, along the following lines.

2. A State passes a Domestic Relations Act relating to property, to adoption, guardianship, custody or maintenance of or access to children, to children generally and to domestic relations.

The interpretation section in the Act defines a prescribed person as a Judge of the Family Court of Australia including the Chief Judge or a Senior Judge.

The appointment section in the Act provides that a prescribed person may be appointed by the Governor to hold office for such period, not exceeding seven years, as is specified in the instrument of his appointment but is eligible for re-appointment provided that any such period shall expire upon his attaining the age of sixty-five years.

The substantive section in the Act provides that a person appointed under the Act shall, subject to the Family Law Act 1975 (Cth.), have jurisdiction in all matters concerning or associated with (i) property, (ii) adoption, guardianship, custody or maintenance of or access to children, (iii) children generally, (iv) domestic relations.

3. Under these provisions a State could appoint, as a personal appointment and to act in a personal capacity, a Judge of the Family Court of Australia. The appointee would then exercise jurisdiction as such a designated person which he could not have exercised as a Judge of the Family Court.

Of course, the device would require the co-operation of the Commonwealth Government; and, if thought necessary, an allowance could be made to the appointee in respect of his State jurisdiction. Moreover, a State may be persuaded that it surrenders less to the central government under this proposal where the initiation and control remain with the State and in State legislation than under the usual proposal of a State reference of family law matters to the central government in order to attract s. 51(xxxvii) of the Constitution. For the reference may seem to the State irretrievable and beyond State control once it is enshrined in federal legislation under s. 51(xxxvii).

4. The case law that distinguishes between the appointment of a person as a designated person to undertake functions which he could not have otherwise undertaken and the appointment of a court or judge to undertake circumscribed functions is explained in Lane, "Australian Federal System", 2nd ed., pp. 507-508 (1979).

5. (1) A particular instance of the use of this device was allowed by the Full Court of the Federal Court of Australia in Drake v. Minister of State for Immigration and Ethnic Affairs (1979) 24 A.L.R. 577, at pp. 583-584. The Federal Court distinguished (i) the actual appointment of Mr Justic Davies, as "a personal appointment . . . in his personal capacity", (at p. 584) to be a Deputy President of the Administrative Appeals Tribunal, and (ii) the statutorily required qualifications of such an appointee, viz., the qualifications of a Judge of a court created by Federal Parliament. These qualifications are prescribed by s. 7(1) with s. 3(1), s.v., "Judge", of the Administrative Appeals Tribunal Act 1975 (Cth.).

Mr Justice Davies was at the time, and is, a Judge of the Federal Court of Australia and, as such, must exercise judicial powers. But in his "personal capacity" as a Deputy President of the Administrative Appeals Tribunal he exercises administrative, that is, non judicial powers.

(2) The difference between my proposal and the case of Mr Justice Davies is that I am suggesting that the one person act for the Commonwealth as a Judge and on the other hand for the State as a designated person, whereas Mr Justice Davies acts for the Commonwealth as a Judge and again for the Commonwealth as a Deputy President of the Administrative Appeals Tribunal. But there have been cases where the High Court has accepted the one official drawing his complementary functions from the Commonwealth and the State, namely, the joint Coal Industry Tribunal and the Local Coal Authorities. See R. v. Lydon; ex parte Cessnock Collieries Ltd. (1960) 103 C.L.R. 15, at pp. 19-20; Lydon sat as a Local Coal Authority, authorised by complementing Commonwealth and New South Wales Acts; and see ibid., at p. 22, suggesting that Lydon might have validly exercised judicial power under the State Act while exercising non judicial power under the federal Act.

Second Opinion

1. In paras. 2-5 of the first Opinion I proposed a dual court system to avoid the conflict between what is a Commonwealth-regulable matter and what is a State-regulable matter in family law.

2. The dual court system I am proposing is built on the following propositions:

(1) The uniformity of the Family Court of Australia ("the Family Court"), and the unlikelihood of its being dismantled.

(2) The reach of the Family Court of Western Australia, but on its State jurisdiction side only, which can make good the limitations in the Family Court of Australia.

(3) The distinction between the appointment in his personal capacity of a person as a designated person having statutorily required qualifications (viz., the qualifications of a Judge of the Family Court) in order to undertake functions which he could not have otherwise undertaken (as is proposed here) and the appointment of a court or judge to undertake circumscribed functions.

(4) The complementary use by the Commonwealth and the State of a common entity, drawing its two streams of authority from a Commonwealth source (here principally the Family Law Act 1975 (Cth.)) and a State source (here the Domestic Relations Act suggested in the first Opinion, para. 2).

In essence the dual court system combines in the one federal-court-designated-person

the Family Court of Australia and the Family Court of Western Australia, the latter in respect of its State jurisdiction only.

3. Under the proposal the six States appoint, as a personal appointment and in his personal capacity, a Judge of the Family Court of Australia (see paras. 3 and 4 of the first Opinion) to exercise jurisdiction as part of the Supreme Court of the State in all matters concerning or associated with (i) property, (ii) adoption, guardianship, custody or maintenance of or access to children, (iii) children generally, (iv) domestic relations—not being matters concerning or associated with matters assigned to the Family Court by the Family Law Act 1975 (Cth.) ("the Act"), the Marriage Act 1961 (Cth.) or any other Act.

4. Since each Judge of the Family Court of Australia is appointed in the way suggested by all six States, as well as being appointed by the Commonwealth, the Judge retains his present mobility to act in any State in which he happens to sit. Thus, when sitting in Queensland a Judge of the Family Court of Australia draws on his authority from his Queensland (personal) appointment, in addition to his Commonwealth authority; when sitting in New South Wales, the same Judge draws on his authority arising from his New South Wales (personal) appointment as well as his Commonwealth authority, and so on.

5. Since each State makes the appointment in regard to the same set of comprehensive matters listed in para. 4 above, no difference of jurisdiction occurs as between the various State sittings, whether the Judge be mobile as in para. 5 above or assigned permanently to a particular State.

6. The State appointment is in respect of appellate jurisdiction, as well as original jurisdiction. Then the dual court can take internal appeals under s. 94 of the Act or other appeals referred to in s. 29 of the Act, even though the decree or decision appealed from has State elements.

7. (1) The State appointment of a designated person to exercise jurisdiction as part of "the Supreme Court of the State" is necessary to allow the continuance of appeals to the High Court from the dual court: see s. 95 of the Act. For such an appeal to the High Court from the dual court may include State elements; and generally the High Court can take an appeal with State elements from "the Supreme Court of (a) . . . State" alone: see s. 73(ii) of the Constitution.

(2) That part of the dual court which is constituted by a designated person (personally) appointed by a State to exercise jurisdiction as part of the Supreme Court of the State will be regarded as the Supreme Court of a State, for instance, for purposes of an appeal to the High Court under s. 73 of the Constitution. While that part of the dual court just mentioned may be "established under another name" than that used for a Supreme Court in 1900, that part of the dual court has "similar functions" to a Supreme Court in 1900: Parkin v. James (1905) 2 C.L.R. 315, at p. 330. Analogously, the Court of Criminal Appeal of New South Wales is regarded as the Supreme Court of New South Wales: Stewart v. The King (1921) 29 C.L.R. 234; and see Saffron v. The Queen (1953) 88 C.L.R. 523. All that the State need do is to ensure that, in its appointment of a designated person, the State does "not create or constitute a new court distinct from the Supreme Court, but merely (directs) that the Supreme Court (through the designated person) shall act as" a part of the dual court; and then that part of the dual court which is constituted by a designated person appointed by a State will be regarded as the Supreme Court of the State. See Stewart v. The King above, at p. 240.

Appendix 6

OPINION OF MR RICHARD GEE

The power of the Commonwealth to designate specific magistrates and specific courts of summary jurisdiction to exercise federal jurisdiction under the Family Law Act

In relation to proposals under consideration, the Joint Select Committee on the Family Law Act has asked for my opinion as to whether the Commonwealth in conferring federal jurisdiction on State courts of summary jurisdiction under s.39(6) of the Family Law Act can designate particular magistrates and particular courts to exercise the jurisdiction in question.

The relevance of Section 39(2)(d) of the Judiciary Act for the purposes of the discussion is that that provision was said by the High Court of Australia to be valid either under Section 51 (xxxix) of the Constitution or under Section 79 of the Constitution see *Queen Victoria Memorial Hospital* v. *Thornton* (1953) 87 C.L.R. 144 at page 152.

As will be recalled, Section 79 of the Constitution provides:

> The Federal jurisdiction of any Court may be exercised by such number of judges as the Parliament prescribes.

It will be noted that the High Court assumes that the word 'judge' in that section, means 'judicial officer', as the section, the validity of which they upheld by reference to this provision provides for the constitution of a Court of summary jurisdiction by a magistrate.

Further Section 51(xxxix) of the Constitution provides that:

> the Parliament shall subject to this Constitution, have power to make laws for the peace, order and good government of the Commonwealth with respect to:
>
> (xxxix) Matters incidental to the execution of any power vested by this Constitution in the Parliament.

In R. v. *Ray, Ex parte Smith* (1948) S.A.S.R. 216, in an action brought under the National Security (Landlord and Tenant) Regulations in a local court, the Full Court of the Supreme Court of South Australia rejected the argument that there was any right to a trial of the issue by a court constituted by a special magistrate and two Justices of the Peace in accordance with the terms of the State Local Courts Act, because the National Security (Landlord and Tenant) Regulations specifically provided that such jurisdiction should be exercised by a special magistrate sitting alone. Napier C. J. said:

> It was contended that the Commonwealth when it invests the Court of a State with Federal Jurisdiction must take the court as it finds it, but that does not compel the Commonwealth to adopt rules of procedure which it regards as inapplicable or inappropriate. If the State Court is so organised as to function in different ways for different purposes, I think that the Commonwealth must have the power to commit Federal Jurisdiction to the State Court functioning in the manner that is, or is considered to be, best suited to its purposes. *(Troy* v. *Wigglesworth; Lorenzo* v. *Carey).* Once jurisdiction becomes Federal, the Commonwealth can at will regulate the procedure and control the method of the relief (1948) S.A.S.R. 216 at p. 233.

As Cowen and Zines observe in *Federal Jurisdiction in Australia*, 2nd Edition, at pages 193-194:

> The Court did not specify the constitutional authority to prescribe the composition of State Courts invested with Federal Jurisdiction but the language of Napier C. J's judgement suggests that it is to be discovered in Section 51(xxxix), rather than in Section 79. It appears to have been the Court's view that the regulation of the composition of State Courts is a matter of procedure, and that it is open to the Federal Parliament to control the procedure to be adopted by a State Court invested with Federal Jurisdiction. The breadth of the proposition stated by Napier C. J. suggests that it is also open to Parliament *pace* Jordan C. J. in *Ex parte Coorey*, to designate a particular judge (or judges) to exercise the Federal Jurisdiction of a State Court, and it is not easy to distinguish that case from such legislation as Section 39(2)(d) which the High Court has expressly declared to be valid.

In *Russell* v. *Russell* (1976) A.L.R. 103, the Court was amongst other things, concerned with the validity of Section 97(1) of the Family Law Act providing that, with certain exceptions, all proceedings in the Family Court or in another Court, when exercising jurisdiction under the Act, should be heard in a closed Court and Section 97(4) providing that neither the Judge nor counsel in respect of proceedings under the Act should robe. As you will recall, the Court held that, in relation to State Courts exercising jurisdiction under the Act, Section 97(1) was invalid, whereas Section 97(4) was valid. As you will recall, a majority of the Court considered that the provisions regarding the non-wearing of robes was a matter of laying down rules of procedure, whereas that relating to the closure of Courts intruded into the constitution and organisation of State Courts.

That case pointed up a distinction drawn by the High Court in *Le Mesurier* v. *Connor* (1929) 42 C.L.R. 481, *Bond* v. *George A. Bond & Co. Limited and Bonds Industries Limited* (1930) 44 C.L.R. 11, *R.* v. *Davison* (1954) 90 C.L.R. 353, *Kotsis* v. *Kotsis* (1970) 122 C.L.R. 69, *Knight* v. *Knight* (1971) 122 C.L.R. 114, *Silk Bros. Pty Limited* v. *State Electricity Commission of Victoria* (1943) 67 C.L.R. 1, *Ex Parte Coorey* (1944) 45 S.R. (N.S.W.) 287, at 304-305 and *Aston* v. *Irvine* (1955) 92 C.L.R. 353, and the other cases cited above, between an attempted alteration of the constitution of a State Court or the organisation through which its jurisdiction and powers are exercised (which is outside the limits of Commonwealth power) and legislating to make the investiture of Federal Jurisdiction effective (which is within Commonwealth power).

In conclusion I should refer to Section 77(3) of the Constitution which provides as follows:

> With respect to any of the matters mentioned in the last two sections (i.e. Sections 75 and 76) the Parliament may make laws—
> (iii) investing any Court of a State with Federal Jurisdiction

Turning now to the present Act, Section 39(6) of the *Family Law Act* 1975 provides that subject to Part 5 of the Act, the Courts of Summary Jurisdiction of each State are invested with Federal Jurisdiction and jurisdiction is conferred on the Courts of Summary Jurisdiction of each Territory to hear and determine the matters specified in Section 39(6).

By Section 26(d) of the *Acts Interpretation Act* 1901 (Commonwealth), it is provided:

> In any Act, unless the contrary intention appears—
> (d) Court of Summary Jurisdiction shall mean any Justice or Justices of the Peace or other Magistrate of the Commonwealth or part of the Commonwealth, or of a State or part of a State, sitting as a Court for the taking of Summary Orders or the Summary Punishment of Offences under the law of the Commonwealth or part of the Commonwealth or under the law of a State or by virtue of his or their Commission or Commissions or any Imperial Act.

Accordingly, what Section 39(6) of the Family Law Act has done has been to invest with Federal Jurisdiction to hear and determine the matters specified in that section any Magistrate, Justice or Justices of the Peace of a State or part of a State sitting as a Court for the making of summary orders or the summary punishment of offences under *inter alia* Commonwealth and/or State Law.

Such a provision is, in the light of the discussion set out above, clearly valid as a matter of legislating to make the investiture of Federal Jurisdiction effective, and is valid either under Section 77(iii) and/or Section 51(xxxix) and/or Section 79 of the Constitution, although as will be apparent from the discussion set out above, it is not clear upon which, or a combination of which of the above provisions, it is valid.

It will be apparent also from the discussion set out above that it would be an open question as to whether the Parliament of the Commonwealth could go further and provide that the Federal Jurisdiction of Courts of Summary Jurisdiction already invested upon them by Section 39(6) should be further exercised by such magistrates as were specially authorised by the Governor-General by proclamation or otherwise to exercise such jurisdiction. It would be very difficult to determine in advance whether such a provision would survive a challenge to its validity in the High Court upon the grounds that it went beyond legislating to make the investiture of Federal Jurisdiction effective, and amounted to an attempted alteration of the constitution of courts of Summary Jurisdiction. The argument in favour of the validity of such a provision would seek to rely upon the passage cited from *Cowen and Zines* at page 194 and referred to above; the argument against validity would seek to rest upon the comment of *Sir Frederick Jordan* in *Coorey's Case* at page 305, that

> so far as Section 39(2)(d) of the Judiciary Act purports to enable the Governor-General to select a particular magistrate of the State and specifically authorise him to exercise Federal jurisdiction of a State Court, I am of the opinion that they are ultra vires the Constitution as interpreted by the High Court.

and also to rely upon the argument which ultimately prevailed in *Le Mesurier* v. *Connor* (Supra).

Appendix 7

Recommendation 37—Presumption of Joint Ownership of the Matrimonial Home

Mr Gee has provided the following draft of the amendments necessary to the Act to effect the recommended presumption:

Insert a s.77A in the Act to read:

"Parties to a marriage shall, to the exclusion of any presumption of advancement or other presumption of law or equity, be presumed to hold or to have held as tenants in common in equal shares so much of any real property as consists of a dwelling and its curtilage (if any) which was acquired by them or either of them at any time during or in contemplation of marriage wholly or principally for occupation as their matrimonial home."

Insert a s.77B to read:

(a) The parties to a marriage, or any two persons in contemplation of their marriage to each other, may for the purpose of contracting out of the provisions of s.77A, make such agreement with respect to status ownership and division of the property referred to in s.77A as they think fit.

(b) Every agreement entered into under this section shall be in writing signed by both parties.

(c) Each party to an agreement under this Section shall have independent legal advice before signing the agreement.

(d) The signature of each party to an agreement under this Section shall—
  (i) If signed in Australia, be witnessed by a solicitor of the Supreme Court of the State or Territory of Australia in which the agreement was signed;
  (ii) If signed in a Commonwealth country outside Australia, be witnessed by a solicitor entitled to practice in that country or by a notary public; or
  (iii) If signed in a country that is not a Commonwealth country, be witnessed by a notary public, and, in every case, the witness shall certify that before the party whose signature he has witnessed signed the agreement he has explained to that party the effect and implication of the agreement.

(e) An agreement under this Section entered into by a minor and every instrument executed by any such minor for the purposes of giving effect to any such agreement, shall be as valid and effectual as if the minor were of full age. Provided that where a minor has not attained the age of 18 years and has not been married an agreement under this Act shall not be valid without the approval of a Court, which may be given upon application by the minor before or after the agreement has been signed by the parties.

(f) An agreement under this Section shall be void in any case where—
  (i) sub-sections (b), (c) and (d) of this section have not been complied with; or
  (ii) a Court is satisfied that it would be unjust to give effect to the agreement.

(g) In deciding whether it would be unjust to give effect to an agreement under this Section, a Court shall have regard to—
  (i) the provisions of the agreement;
  (ii) the time that has elapsed since the agreement was entered into;
  (iii) whether the agreement was unfair or unreasonable in the light of all the circumstances at the time it was entered into;
  (iv) whether the agreement has become unfair or unreasonable in the light of any changes in circumstances since it was entered into (whether or not those changes were foreseen by the parties);
  (v) any other matters that the Court considers relevant.

(h) Nothing in this Section shall limit or affect any enactment or rule of law or of equity whereby a contract is void, voidable or unenforceable on any other ground.

(i) Where any agreement purporting to be made pursuant to this Section is void or is avoided or is unenforceable the provisions of this Act (other than this Section) shall have effect as if the agreement had never been made.

(j) Nothing in this Section shall limit or affect the power of the husband or the wife to make gifts to each other; notwithstanding any rule of law a gift between husband and wife may be made in writing but shall not require to be made by deed or by delivery.

(k) An order under s.79 may be made and shall have effect notwithstanding any agreement under this Section.

Insert in s.79(4) the following sub-paragraphs—

(f) The terms of s.77A

(g) The terms of any agreement made pursuant to s.77B

Insert new sub-section in s.79 to read:

(5) The presumption referred to in s.77A may, in proceedings under this Act, be rebutted by sufficient evidence of intention to the contrary and by the presence of any special circumstances which appear to the Court to render it unjust to apply that presumption for the purpose of the proceedings.