

**FAMILY LAW  
SUMMARY 2009**



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# 1. The Framework of Family Law

## 1.1 Introduction to Family Law

- The family is an integral social institution which is the foundation of all civilised societies. Article 23 of the UN International Covenant on Civil and Political Rights provides a concise definition of a family as the “natural and fundamental group unit of society.”
- There are primarily two types of families:
  - Marriage-based families – the traditional family which involves a husband, wife and/or children.
  - Cohabitation-based families – the contemporary family which involves any relationship between two or more individuals sharing residence (includes de facto and domestic relationships).
- The legislation which is relevant for both marriage-based and cohabitation-based families include:
  - The Family Law Act 1975 (Cth) - established the Family Court of Australia and regulates divorce, parentage and parenting disputes, spousal support of married partners, child support for children making claims against parents (if over 18 years old) and/or step-parents, property disputes between married partners, and injunctions relating to family violence.
  - The Marriage Act 1961 (Cth) – regulates annulments.
  - The Property (Relationships) Act 1984 (NSW) – regulates maintenance payments and property settlements for de facto partners (note that this legislation will soon become irrelevant, see 2.2).
  - The Child Support (Registration and Collection) Act 1988 (Cth) and the Child Support (Assessment) Act 1989 (Cth) – established the Child Support Agency within the Australian Taxation Office and regulates child support.
  - The Crimes (Domestic and Personal Violence) Act 2007 – governs the law relating to apprehended domestic violence.

## 1.2 Historical Background of Family Law

### 1.2.1 Ecclesiastical Law

- In early Christian law, there were no formal requirements for the recognition of marriage. However, the *Clandestine Marriages Act of*

1753 (Lord Hardwicke's Act) established a requirement that all marriages in England must occur in the Church of England. Subsequently, the *Registration Act 1837* (Eng) required the Church of England to maintain a record of all marriages under English law.

- Ecclesiastical law provided the following forms of relief when the marriage relationship broke down including:
  - Annulment – principal form of relief which rendered the marriage void but required proof of a ground of nullity:
    - one of the parties was already married; or
    - the parties are interrelated.
  - Parliamentary Divorce – established under the *Divorce and Matrimonial Causes Act 1857* but was limited to the wealthy classes due to its three-fold procedure:
    - the attainment of a decree of divorce *a mensa et thoro* through proof of adultery (the grounds were extended to cruelty, desertion for three years and incurable insanity, through the *Matrimonial Causes Act 1937* (Eng.);
    - the attainment of damages from the party at fault; and
    - the petitioning to the House of Lords for a divorce *a vinculo*.
  - Restitution of Conjugal Rights – An order that the husband or wife return to the matrimonial home or to perform some act required by marriage.
  - Jactitation of Marriage – An order which prevented a couple from pretending to be marriage when they had not complied with the formal marriage requirements.

### 1.2.2 Early Australian Law

- The English divorce laws (*Divorce and Matrimonial Causes Act*) were quickly implemented in the Australian States.
- During the nineteenth and twentieth centuries, a considerable distinction arose between the divorce laws of the States. For example, in 1959, the number of grounds for divorce ranged from five in Queensland to thirteen in South Australia.
- The Commonwealth Parliament decided that it was necessary to unify the divorce laws and, consequently, exercised its federal powers under

the Constitution to enact the *Matrimonial Causes Act 1959* and the *Marriage Act 1961*.

### **1.3 Federal and State Powers**

#### **1.3.1 Federal Powers**

- The powers of the Commonwealth in relation to family law were laid down in s 51 of the Constitution including:
  - the right to pass laws with respect to marriage (s 51(xxi)); and
  - the right to pass laws with respect to divorce and matrimonial causes, and in relation thereto, parental rights and the custody and guardianship of infants (s 51(xxii)).
- The Commonwealth initially used these powers to enact the *Matrimonial Causes Act 1959* and the *Marriage Act 1961* which established a national legal system with respect to marriages and matrimonial causes that would be administered by State courts.
- During the 1960s, a discontent arose for these laws because it victimised the party at fault in a divorce proceeding by favouring the innocent party in property settlements, maintenance and matters regarding their children. In response to this discontent, the Commonwealth used their powers under the Constitution (including Chapter III) to enact the *Family Law Act 1975*.
- Senator Lionel Murphy drafted the *Family Law Act* with the following objectives:
  - establishment of the Family Court of Australia;
  - creation of a less formal judicial system through a closed court and the prohibition of the use of robes in court (s 97 – note that these requirements were amended in 1983 to make all proceedings in the Family Court to be heard in open court);
  - promotion of alternative dispute resolution; and
  - creation of a simplistic method of divorce through the abolition of fault-based divorce and substitution with divorce based on the “irretrievable breakdown of marriage”.
- The constitutional validity of the Act was considered in the High Court decision of *Russell v Russell* where it was held that:
  - the requirement upon State courts to hear proceedings in closed court is invalid because it amounts to transforming the court into a different kind of tribunal;

- the prohibition of robing in court was valid;
  - the definitions of “matrimonial cause” and “child of the marriage” were too broad;
  - the Commonwealth has power to create a jurisdiction in relation to maintenance, property and custody, provided that the proceedings are for principal relief; and
  - the marriage power (s 51(xxi)) allows for the enforcement of rights, duties and obligations which are created by marriage.
- The effect of this decision was illustrated in the subsequent amendments to the Act which provided that no proceeding could be allowed in relation to property, maintenance, custody or injunctions, that were not between the parties to a marriage.

### 1.3.2 State and Territory Powers

- The States and Territories have residual legislative power in relation to:
  - adoption;
  - artificial conception;
  - care and protection of children;
  - status of children;
  - domestic violence;
  - family provision;
  - wills, probate and administration of estates; and
  - registration of births, deaths and marriages.

### 1.3.3 State Referral of Powers

- In 1986, NSW referred the power over ex-nuptial children to the Commonwealth (*Commonwealth Powers (Family Law – Children) Act 1986* (NSW)). The other States (with the exception of Western Australia, see 1.3.4) similarly referred this power.<sup>1</sup>

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<sup>1</sup> *Commonwealth Powers (Family Law – Children) Act 1986* (Victoria); *Commonwealth Powers (Family Law – Children) Act 1986* (South Australia); *Commonwealth Powers (Family Law – Children) Act 1987* (Tasmania); *Commonwealth Powers (Family Law – Children) Act 1990* (Queensland).

- This enabled the Commonwealth to amend the *Family Law Act* in order to determine all parenting disputes regardless of whether the children were born of the marriage.
- However, the referral of power did not extend to the care and protection matters of ex-nuptial children.

### 1.3.4 The Family Court of Western Australia

- Section 41 of the *Family Law Act* allowed for the establishment of State Family Courts which could administer both federal and state family law and, hence, unify family law in the particular State.
- Western Australia decided to take advantage of this provision and passed the *Family Court Act 1975* (Western Australia) which established the Family Court of Western Australia.
- The unification of federal and state jurisdiction in Western Australia meant that there was no necessity for the referral of power over ex-nuptial children to the Commonwealth.

### 1.3.5 Cross-Vesting of Jurisdiction

- The cross-vesting scheme was established to enable the federal courts to exercise State jurisdiction and vice versa. The reasoning behind this scheme was to ensure that either a federal or State court could effectively deal with all issues that arose in a particular proceeding.
- The constitutional validity of the scheme was challenged in *Re Wakim; Ex parte McNally* where the High Court held that it was invalid to the extent that federal courts could not exercise State jurisdiction. In the context of family law, the decision meant that the Family Court could not exercise State jurisdiction for the purposes of resolving a dispute where a party would need to resort to both jurisdictions.

## 1.4 The Family Law Act

### 1.4.1 Family Court of Australia

- Part IV of the *Family Law Act* established the Family Court of Australia to deal with matters arising under the Act.
- The Act was initially drafted so that there was a requirement of a closed court and a prohibition on the use of robes (s 97). The reasoning behind this provision was to create an informal judicial system which minimized the anxiety levels of litigants. However, after numerous attacks on judges of the Family Court, the Act was amended in 1983 to make the court available to the public and allow the use of robes.

- The appointment of judges is regulated by s 22 of the Act which provides that a person shall not be appointed as a judge unless s/he has been a federal or State court judge, or has been a legal practitioner for at least five years, and is a suitable candidate for dealing with matters concerning family law. In addition, judges of the Family Court are appointed until they reach the age of 70 years.

#### 1.4.2 Registrars and Judicial Registrars

- The *Family Law Act* enabled registrars (public servants who are not appointed) to hear and determine lower level family law matters (s 26B).
- The constitutional validity of s 26B was challenged in *Harris v Caladine* and *Harrington v Lowe* but survived on the basis that there was a system of judicial review.

#### 1.4.3 Federal Magistrates Court

- The *Federal Magistrates Act 1999* established the Federal Magistrates Court to deal with matters concerning divorce and various ancillary matters.
- The Federal Magistrates Court does not have exclusive jurisdiction in any particular area although divorces must be filed with the court.

#### 1.4.4 Principles to be Applied by the Courts

- Section 43 of the *Family Law Act* outlines the principles to be applied by the courts with respect to family law matters. They include:
  - 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; and
  - the need to give the widest possible relief to the family as the natural and fundamental group unit of society.



**If you have any queries regarding ordering the Family Law  
Summary please email - [info@lawskool.com.au](mailto:info@lawskool.com.au)**