

FAMILY LAW SUMMARY



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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:

- Prior to the *Divorce and Matrimonial Causes Act 1857* the legal concept of divorce did not exist. Though there were the concepts of:
 - Annulment – principal form of relief which rendered the marriage void. This is not a divorce. A divorce is the dissolution of a valid marriage. An annulment deems that there was no valid marriage to begin with. An annulment required proof of a ground of nullity:
 - one of the parties was already married; or
 - the parties are interrelated.
 - Decree of Separation – the Church of England can make such a decree in situations where there is matrimonial fault or misconduct.
- Parliamentary Divorce – established under the *Divorce and Matrimonial Causes Act 1857*. This statute also resulted in marriages coming under the jurisdiction of the State Courts rather than that of the Ecclesiastical. Divorce was limited to the upper 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 century, a considerable divergence in divorce laws arose between 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*.



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