THE FAMILY LAW ACT: BACKGROUND TO THE LEGISLATION

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Few Acts containing provisions for general legislative change in recent years have provoked as much controversy throughout all sections of the community as the Family Law Act 1975.[1] This should come as no surprise, since the Act will replace the existing divorce law, which is an area of the law with which persons in all sections of the community from the very rich to the very poor can come into contact. Marital problems know no social barriers. The history of legislative change in the area of family law, particularly divorce law, has shown that any substantial change in the divorce law in a community is likely to be attended by the vigorous expression of conflicting opinion. The Family Law Act has certainly conformed to past precedents in that regard. The controversy has even penetrated the legal profession, with judges, Queen's Counsel, solicitors, women lawyers and other groups within the profession variously feeling impelled to write to newspapers and journals, to take to the air or climb onto public platforms to express their respective views on the Act.

Against this background of public and professional interest, I shall describe the historical background to the Act, the policy behind its main provisions, how it evolved from the first proposals to its initial introduction into Parliament, and the changes made during its passage through Parliament. I shall also give a brief indication of how the Family Courts established by the Act might be expected to operate.

Historical Background to Former Divorce Legislation

It is not my intention to make a detailed examination of English and Australian matrimonial legislative history. It does, however, seem desirable to refer to the salient events so as to provide a background against which the emergence of the Family Law Act can be seen in perspective.

From the time of the Norman Conquest in 1066 up until the middle of the last century (with the possible exception of a period in the twelfth century) jurisdiction in matrimonial causes in England was exercised exclusively by the ecclesiastical courts. These courts could not grant the dissolution of marriages: the relevant forms of relief were either annulment of the marriage (known as divorce *a vinculo*) or what we would now call judicial separation (known as divorce *a mensa et thoro*). The grounds on which a divorce *a vinculo* could be granted were far wider than the present nullity grounds – for example, the prohibited degrees of relationship were far wider then. On the other hand, the grounds for a decree of divorce *a mensa et thoro* were, generally speaking, confined to adultery and cruelty.

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1. No. 53 of 1975. Under section 2, the Act came into operation on a date fixed by Proclamation, that is on 5 Jan. 1976.

In 1533, appeals to Rome from English ecclesiastical courts were abolished by English statute in all matters, including matrimonial cases.[2] However, although for the remainder of the sixteenth century the matter is not free from doubt, it appears that there was no change in the substantive ecclesiastical law of England preventing the dissolution of marriages. Certainly by the time dissolution of marriage by private Act of Parliament became established by the end of the seventeenth century, it was clear that this was the only way in which a marriage could be dissolved in England.

Private Act of Parliament continued to be the only means of dissolving a marriage in England until the middle of the nineteenth century. Obviously this put divorce out of reach of everyone except the very small proportion of the population constituted by the wealthy. In fact, in the two centuries in which divorce by Act of Parliament was the practice, only two to three hundred such Acts were successfully promoted. The more limited matrimonial relief dispensed by the ecclesiastical courts was also very expensive owing to its great complexity, and was therefore also beyond the reach of the great majority of the English population.

Increasing public dissatisfaction with the obvious inadequacy of the matrimonial causes law and administration in England led to the appointment of a Royal Commission in 1850 to enquire into the state of this area of the law. The Commissioners published their report in 1853, and legislation to give effect to their recommendations, the Matrimonial Causes Act, was eventually passed in 1857.[3] The main changes made by this Act were: the establishment of a new court to hear divorce and matrimonial causes, the transfer to the court of the existing matrimonial causes jurisdiction of the ecclesiastical courts, the substitution of the decree of judicial separation for the decree of divorce *a mensa et thoro,* the widening of the grounds on which it could be granted to include desertion, and, most important of all, the conferring on the court of jurisdiction to dissolve marriages on the ground of adultery (on the petition of a husband) or adultery plus an aggravating circumstance such as desertion or cruelty (on the petition of a wife). The Act also provided for such other matters as discretionary and absolute bars to the granting of a divorce, and claims for damages for adultery against a co-respondent.

Australia

There was no law governing matrimonial causes in the Australian colonies at the time the English Matrimonial Causes Act 1857 was passed, since there were no colonial ecclesiastical courts to assume the jurisdiction exercised by the English ecclesiastical courts. Soon after the passage of the English Act, the Colonial Office invited the Australian colonial governments to pass similar statutes. This invitation was acted upon in South Australia in 1858 with the passage of the Matrimonial Causes Act[4] which, in section 12, provided for slightly more liberal grounds of divorce than its English predecessor. This was followed by Acts in Tasmania[5] in 1860, Victoria[6] in

2. Act in Restraint of Appeals 1533 (24 Hen. VIII, c. 12).
3. 20 & 21 Vict. c. 85.
4. No. 22 of 1858.
5. Matrimonial Causes Act 1860, 24 Vict. No. 1.
6. Marriage and Matrimonial Causes Act, No. 125 of 1861.

1861, Western Australia[7] in 1863, Queensland[8] in 1864 and, finally, New South Wales[9] in 1873. Each of these Acts was modelled on the English Act and, in some cases, such as the South Australian Act, containing slightly more liberal grounds for divorce than the English Act.

Subsequent legislation of the colonies – or States, as they became on Federation – resulted in a wide divergence in both form and content among their respective divorce laws. To give two notable examples, Western Australia alone provided for a no-fault ground of separation such as that contained in section 28(m) of the Australian Matrimonial Causes Act 1959-1973 (repealed by the Family Law Act 1975); and some States provided for a ground of habitual cruelty while others did not.[10]

Among the powers of the Australian Parliament under section 51 of the Constitution at the birth of Federation were those of making laws for the peace, order, and good government of the Commonwealth with respect to:–

(xxi.) Marriage;
(xxii.) Divorce and matrimonial causes; and in relation thereto, parental rights, and the custody and guardianship of infants.

It has been said that the powers set out in these two paragraphs were included with the specific purpose of enabling

> the Federal Parliament to abolish the varied and conflicting divorce laws which prevail in the States, and to establish uniformity in the causes for which divorce may be granted throughout the Commonwealth. This is considered advisable in order to avoid the great mistake made by the framers of the Constitution of the United States of America, who left the question for the States to deal with as they respectively thought proper. It has been well said, that if there is one defect in that Constitution more conspicuous than another it is its inability to provide a number of contiguous and autonomous communities with uniformity of legislation on subjects of such vital and national importance as marriage and divorce. At present persons who, according to the law of the State in which they reside, would have no right to a divorce, may become domiciled in another State by living there a certain time, and then, according to the laws of that State, may obtain a divorce for reasons which, in their own State, would have been insufficient. In some cases they may be divorced without a domicile. All these circumstances point to the conclusion that, unless we wish to repeat, in these communities, the condition of things which has obtained in America, it is necessary to provide for uniformity in the law of divorce.[11]

Compelling as these reasons appeared in 1901 for the enactment of uniform marriage and divorce laws for the whole of Australia, no Australian government

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7. Divorce and Matrimonial Causes 1863, 27 Vict. No. 19.
8. Matrimonial Causes Jurisdiction Act 1864, 28 Vict. No. 29.
9. Matrimonial Causes Act 1873, 36 Vict. No. 9.
10. A definitive table of the differences between the grounds of divorce under the legislation of the States was incorporated in Hansard by Attorney-General Barwick in the course of his second reading speech in the Australian Parliament on the Matrimonial Causes Bill 1959: see H. R. Deb., 14 May 1959, 2233.
11. R. E. O'Connor and I. A. Isaacs in the Australasian Federal Convention debates, Sydney, 1897 (quoted in Quick and Garran: *The Annotated Constitution of the Commonwealth of Australia*, (1901) 610).

attempted to legislate comprehensively on the subject of matrimonial causes for nearly sixty years, that is, until the bill for the Matrimonial Causes Act was introduced into Parliament by Sir Garfield Barwick in 1959. In his second reading speech on the bill, Sir Garfield referred[12] to a private member's Bill introduced into the first Australian Parliament in 1901. This was a Divorce Bill introduced by Senator Dobson and read a first time on 11 September 1901.[13] It was subsequently withdrawn without having progressed any further. In 1919 a very short Act entitled the Matrimonial Causes (Expeditionary Forces) Act 1919 (Cth) was passed to extend to Australia the operation of the Matrimonial Causes (Dominion Troops) Act 1919[14] of the United Kingdom Parliament. This Act did not, however, confer any new matrimonial causes jurisdiction on Australian courts.

The first federal legislation of any consequence concerning divorce was the Matrimonial Causes Act 1945 (Cth), which was sponsored by the then Attorney-General, Dr Evatt, and introduced into Parliament in his absence by the Prime Minister, Mr Chifley. In his second reading speech, the Prime Minister summarized the objectives of the Act:

> first, to enable an Australian woman married to an overseas serviceman or other person from overseas to institute divorce proceedings in Australia; and, secondly, to provide that a person domiciled anywhere in Australia may institute divorce proceedings in the State or Territory in which he or she is for the time being resident.[15]

The need for the first part of the legislation arose from the number of marriages entered into in Australia between Australian women and overseas servicemen stationed in Australia during the Second World War, and the Act was limited to such marriages entered into between 3 September 1939 and (by subsequent Proclamation[16] under the Act) 1 June 1950. The second part of the legislation was intended to meet the difficulty which arose where a wife wishing to obtain a divorce was resident in one State but was domiciled in another because of her husband's domicile in the latter State. It was also intended to meet the problem of recognition in other States of the divorce decree of a State granted on the basis of the "deemed domicile" of a resident wife. The Act was amended in 1955 by legislation introduced into Parliament as a private member's Bill by Mr P. E. Joske, Q.C., M.P.[17] This Act (the Matrimonial Causes Act 1955 (Cth)) extended the effect of the 1945 Act so as to enable a woman who had been resident in a State or Territory for three years to institute proceedings for

> any matrimonial cause in the Supreme Court of that State or Territory as though she were, or had been for any period required by the law of that State or Territory, domiciled in that State or Territory.[18]

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12. H. R. Deb., 14 May 1959, 2222.
13. Sen. Deb., 11 Sep. 1901, 4668.
14. 9 & 10 Geo. 5 Ch. 28.
15. H. R. Deb., 20 July 1945, 4350.
16. Cth of Aust. *Gazette* (1950) 1341.
17. Now the Honourable Mr Justice Joske of the Australian Industrial Court.
18. S. 5.

The above two Acts were confined to easing the inconveniences of the jurisdictional limitations on the power of the State and Territory courts to entertain divorce proceedings. Supporters of the legislation on both sides of Parliament were at pains to emphasize that it did not touch the "sticky subject" – as Mr Chifley called it[19] – of uniform divorce and marriage laws. However, in 1947 Attorney-General Evatt set up a committee to work with the Solicitor-General on the drafting of a comprehensive federal matrimonial causes bill. A bill was drafted, but before it could be introduced into Parliament the Labor Government was defeated in the 1949 federal election. Nevertheless, the work was continued by the Law Council of Australia and later by Mr Joske, who had been a member of Dr Evatt's committee. In 1957 Mr Joske was given leave to introduce into Parliament a Matrimonial Bill to replace the State and Territory divorce laws with a uniform Australian law. A fuller account of the background to this Bill can be found in Mr Joske's second reading speech on the Bill in which he indicated that

> the bill . . . is in substance the bill which was originally drafted by Mr Alderman and me [when commissioned to do so by the Law Council of Australia], incorporating some amendments made by the law societies.[20]

The second reading of the Bill was debated and carried by the House of Representatives on 23 May 1957, but the Bill received no further consideration after reaching the committee stage.

On 25 March 1958, Mr Joske asked the then Prime Minister, Mr Menzies, whether there would be an opportunity for Parliament to discuss further the Matrimonial Bill. In reply, the Prime Minister announced that the Government had decided that "a matrimonial causes measure of a comprehensive kind ought to be brought forward by the Government itself".[21] With the help of Mr Joske's Bill, Attorney-General Barwick and his Department proceeded to prepare a new Bill, which he introduced into Parliament on 14 May 1959 as the Matrimonial Causes Bill. This Bill was finally passed by the Parliament and assented to on 16 December 1959 as the Matrimonial Causes Act 1959 (Cth). The Act was not brought into operation until 1 February 1961, the intervening time being taken up with the preparation of the very comprehensive Matrimonial Causes Rules. Since then the Act has been the subject of three minor amendments,[22] and the Rules have been amended from time to time.

Moves for further divorce reform since the Matrimonial Causes Act 1959

The Matrimonial Causes Act 1959, the "Barwick Act", has been properly recognized as an outstanding legislative achievement, and its repeal by the Family Law Act will in no way diminish its importance in the history of matrimonial law in

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19. H. R. Deb., 20 July 1945, 4352.
20. H. R. Deb., 11 April 1957, 775.
21. H. R. Deb., 25 March 1958, 597.
22. No. 99 of 1965, No. 60 of 1966 and No. 216 of 1973.

Australia, or for that matter, in the common law world. The Act has been accurately described as achieving

> in its completeness, its internal consistency, its logical approach and its liberal attitudes a peak of legislative excellence so far unequalled in the countries which have inherited the English tradition as to marriage and divorce.[23]

However, divorce being a controversial subject not free from opprobrium, it was a big enough step in itself for the Government of the day to have promoted a uniform divorce law for the first time. It was not, therefore, surprising that the Attorney-General, when introducing the Matrimonial Causes Bill, discounted any suggestion that it was pioneering any new ground of divorce. He emphasized that

> the principle behind each of the grounds [of divorce under the bill] has already been accepted in some parts of Australia. The bill in this respect does not seek to go beyond already tried experience in this field of social legislation . . .[24]

Limited as the grounds of divorce were under the Bill, the separation ground contained in section 28(m) still ran into some stiff opposition both inside and outside Parliament before it was finally passed with the rest of the Bill.

Since the Matrimonial Causes Act, admirable though it was in bringing cohesion and uniformity to Australian divorce law, contained no new grounds of divorce, it was not surprising that the legislation should be found wanting by an increasing number of critics within a few years after it came into operation. More and more divorce litigants began to ask why the only way to obtain relief from an unhappy marriage without having to wait at least five years was by subjecting one's self and one's spouse to the humiliation of proving misconduct by one or other, by drawn out and expensive proceedings and by having to bargain over a financial settlement and legal costs before the release could be won. Students of the shortcomings of the divorce law raised the question why the influence of the ecclesiastical law, which governed matrimonial remedies in past centuries, should continue to occupy a place in the divorce law. There was a growing movement in Australia and in other parts of the world for either adding to the existing grounds of divorce, or replacing them with, a ground of irretrievable or irreparable breakdown of the marriage, without the requirement of proof of misconduct by one or other party. The test, it was felt, should be: regardless of whatever be the multitude of causes of difference between the parties to the marriage, has the marriage broken down beyond repair?

In 1969 and 1971 the following two paragraphs were respectively inserted in the Platform of the Australian Labor Party, in Chapter XXIII dealing with Law Reform –

> 11. Laws on divorce and other social issues to be reformed in the light of modern sociology and standards.
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> 14. The law and administration of divorce, custody and other family matters to be altered to remedy existing abuses especially in regard to oppressive costs,

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23. M. D. Broun, "Historial Introduction" to Toose, Watson & Benjafield, *Australian Divorce Law and Practice* (1968), ciii.
24. H. R. Deb., 14 May 1959, 2224.

> delays and indignities. A parliamentary committee to enquire into the growing complaints that the divorce, custody and maintenance laws are operating unjustly and inefficiently.

As the leader of the Opposition in the Senate, Senator Lionel Murphy[25] subsequently moved a motion, which was carried by the Senate on 7 December 1971, for the following matter to be referred to the Standing Committee on Constitutional and Legal Affairs:

> The law and administration of divorce, custody and family matters, with particular regard to oppressive costs, delays, indignities, and other injustices.[26]

During the ensuing year of 1972, the Committee, which contained members of both Government and Opposition parties and included Senator Murphy, invited submissions from interested persons and bodies in the community and advertised its invitation in the press.[27] The Committee held several public and private hearings in which it received evidence from a variety of interested persons. On 31 October 1972 it tabled in the Senate a brief interim report in which it recommended that the Government take action to abolish the requirement for discretion statements in divorce proceedings.[28]

Genesis of the Family Law Bill

Following the change of government at the end of 1972, Senator Murphy took office as Attorney-General and relinquished his membership of the Senate Standing Committee on Constitutional and Legal Affairs. The submissions and evidence received by the Committee while he was a member convinced him more than ever of the need for reform of the divorce law to eliminate fault, simplify procedures and reduce costs. As a result of the Committee's interim report of October 1972, one of his first acts as Attorney-General was to direct preparation of amendments to the Matrimonial Causes Rules to abolish discretion statements and court filing fees, simplify procedures and limit the costs that could be ordered in divorce proceedings. These amendments took effect on 1 February 1973.[29] They were, however, disallowed by resolution of the Senate on 29 March 1973. There followed a division of opinion amongst judges and other learned commentators on the question whether the disallowance operated to revive earlier rules that had been repealed by the disallowed Rules. I do not propose to comment on that issue save to observe that a few of the reforms contained in the disallowed Rules continued beyond the disallowance. For instance, the court fees

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25. Subsequently Attorney-General of Australia and now the Honourable Mr Justice Murphy of the High Court of Australia.

26. Sen. Deb., 7 Dec. 1971, 2413.

27. A full list of submissions received by the Committee and their authors is appended to an interim report of the Committee dated 24 Sep. 1974: *Interim Report on the Law and Administration of Divorce and Related Matters and the Clauses of the Family Law Bill 1974*, (1974) Parl. Pap. No. 134.

28. *Interim Report on the Law and Administration of Divorce and Related Matters*, para. 10, (1972) Parl. Pap. No. 255.

29. Stat. Rules 1973, No. 8.

repealed by the "Murphy Rules" – as they came to be called – were not permanently reimposed in any State.[30]

Just before the Senate disallowed the Rules in March 1973, Senator Murphy invited the Law Council of Australia to make recommendations to him for reform of the Matrimonial Causes Act. The Law Council set up an *ad hoc* committee[31] which shortly afterwards made a series of recommendations that formed the basis for the first draft of what became the Family Law Bill. On 1 April 1973, immediately after the disallowance of the Murphy Rules, Senator Murphy announced he would seek Cabinet approval of a bill to replace the existing grounds of divorce with one no-fault ground – irretrievable breakdown of the marriage. The ground would be established by twelve months' separation of the parties.

Work was begun immediately on preparing a draft bill for this purpose. During drafting of the bill, the title "Family Law Bill" was chosen, because of the wider range of remedies it was proposed to include in the Bill, notably in cases where no divorce was being sought. It was also more appropriate because "family law" had become the accepted generic title for this area of law, and because it was more meaningful to the lay person than "matrimonial causes". When the Bill was still in the course of drafting, Senator Murphy gave at least one public indication of the likely contents, in an address to a meeting of the Sydney University Law Graduates Association on 7 August 1973.

The Family Law Bill – first model unveiled

More than eight months after announcing his intention to legislate for divorce reform, during which time there had been some public discussion of his proposals, Senator Murphy introduced the Family Law Bill 1973 into the Senate on 13 December 1973. An explanatory memorandum was circulated amongst Senators with copies of the Bill and, at the conclusion of his speech, Senator Murphy said:

> ample opportunity will be given to interested persons and bodies to examine the Bill, and to make representations to me on it. I assume that the Standing Committee on Constitutional and Legal Affairs will itself wish to examine the Bill in detail. During the Parliamentary recess I and my officers will be available to explain to any person, inside or outside this Parliament, the provisions of the Bill and, of course, to consider any changes that may be suggested.[32]

More than 3000 copies of the Bill were printed and distributed amongst a large number of bodies and persons known, or thought, to be interested in the Bill.

The significant provisions of the Bill as first introduced may be summarized as follows:

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30. Collection of fees resumed temporarily in Queensland for a short period before ceasing permanently.

31. Comprising R. F. Turner (Law Society of New South Wales), A. Asche, Q.C. (Victorian Bar Council), A. J. Barblett (Law Society of Western Australia), I. B. Burnett (Law Society of South Australia), T. A. Pearce (Law Institute of Victoria), and J. B. Piggott (Law Society of Tasmania).

32. Sen. Deb., 13 Dec. 1973, 2832.

- repeal of the Matrimonial Causes Act;
- extension of jurisdiction to proceedings separate from any divorce proceedings for maintenance, matrimonial property, child maintenance and custody, and injunctions;
- improvement of the reconciliation provisions and their extension to proceedings other than divorce proceedings;
- institution of all proceedings, including divorce proceedings, by application;
- where parties had been divorced, applications for maintenance or property not to be instituted more than twelve months after the decree *nisi* except with the leave of the court;
- jurisdiction of the Supreme Courts to be gradually assumed by the proposed Superior Court of Australia (the legislation for which would provide for a Family Division);
- replacement of the existing grounds of divorce with one ground, irretrievable breakdown of marriage, provable only by the separation of the parties for twelve months up to the *date of the hearing* of the divorce application;
- abolition of: voidable marriages, discretionary and absolute bars to the granting of a divorce, judicial separation, restitution of conjugal rights, jactitation of marriage and the restriction on applications for divorce within three years of the marriage;
- reduction from three months to one month of the period in which a decree *nisi* becomes absolute;
- enunciation of the general principle that, in the absence of a court order, each party to the marriage is the guardian of their children and that they share custody;
- provision for a compulsory conference of the parties with a welfare officer over custody arrangements for children;
- recognition to be given to the wishes of a child over sixteen years in custody proceedings, and provision for his separate legal representation, where sought, in both custody and maintenance proceedings;
- courts given power to order supervision of access orders by welfare officers, and to enforce custody and access orders;
- registration and enforcement interstate of maintenance and custody orders relating to ex-nuptial children, and provision for the reciprocal enforcement of maintenance and custody orders between Australia and prescribed overseas countries;
- maintenance to be based on the needs of the applicant and the ability of the respondent to pay, and courts to have regard to a detailed list of relevant considerations;
- the maintenance of a child to be based on its need and the ability of each of the parents to pay, having regard to a list of relevant considerations (including those relating to the maintenance of a party); orders to be limited to children under eighteen – with a proviso for extending orders beyond that age to enable completion of education;
- more detailed provision for the cessation and variation of maintenance orders;
- exemption from State stamp duty of transfers of property pursuant to a maintenance or property order or settlement;
- registration and enforcement of maintenance agreements;

- abolition of imprisonment of maintenance defaulters;
- all proceedings to be heard in closed court, and greater restrictions on the details of proceedings that could be published;
- informality of proceedings;
- broader code of recognition of foreign divorce decrees;
- each party, as a general rule, to bear his or her own costs of proceedings; and
- either party to a marriage entitled to sue the other in tort or contract.

The next two models

There was a fair response to Senator Murphy's invitation to comment on the Family Law Bill, and some useful suggestions were made for tidying up areas of the proposed legislation. The opportunity for implementing worthwhile suggestions arose when the Bill lapsed, along with other legislation before Parliament, on the prorogation of Parliament on 14 February 1974 prior to the opening of a new Session by the Queen on 28 February 1974. The Bill thus had to be reintroduced into the Senate, and Senator Murphy did so on 3 April 1974. The main principles and provisions of the Family Law Bill 1974 were the same as those of its predecessor. Of the changes that were made, which are detailed in Senator Murphy's second reading speech,[33] the following are the more substantial:

- domicile to be an alternative to Australian citizenship or residence for a year, as a basis for divorce jurisdiction;
- the domicile of a married woman to be determined as if she had never been married, and a person of eighteen years and over (or younger, if married) to have the capacity to acquire a domicile of choice;
- omission of the proviso that enabled leave to be given to apply for maintenance or a property settlement more than twelve months after a decree *nisi,* but applications for maintenance of a child exempted from the twelve month limit;
- the provisions for enforcement of custody and access orders strengthened by the addition of a power to issue a warrant authorizing a person to take possession of a child and hand it over to a person entitled to custody or access;
- orders for maintenance of children over eighteen years extended to mentally and physically handicapped children;
- power given to the court to determine existing title or rights to property; power to order a settlement restricted to divorce proceedings, and criteria for making such an order added;
- the 'special' circumstances in which a court was permitted to make an order for costs replaced with 'exceptional' circumstances, thus reinforcing the general rule that each party bear his or her own costs; and
- a Family Law Advisory Committee to be established to advise the Attorney-General on the working of the Family Law Bill and other matters relating to family law.

There were other amendments and changes which were less substantial or were made only to improve the drafting of the legislation. In concluding his second reading speech

33. Sen. Deb., 3 April 1974, 640.

on the new Bill, Senator Murphy acknowledged with gratitude the helpful suggestions that had been made, and reiterated his hope that the Senate Standing Committee on Constitutional and Legal Affairs would be able to examine the Bill.[34] On 8 April 1974 the Senate carried a motion moved by Senator Murphy that the clauses of the Family Law Bill be referred to the Committee for its consideration in the course of considering the divorce law reference, and that the Committee report to the Senate as soon as possible. However, because the Parliament was dissolved later the same month, the Committee was unable to comply with the resolution.

The dissolution of Parliament in April 1974 meant, of course, that the Family Law Bill again lapsed. It therefore had to be again reintroduced into the Senate, on 1 August 1974. In introducing this, the third bill, Senator Murphy indicated[35] that it was essentially the same as the original 1973 Bill, though the opportunity had been taken to make a few further changes:

- The court was given power, where it ordered one party to live apart from the other, to direct either or both to attend a marriage counsellor.
- Recognition of the wishes of the child in custody proceedings was altered in two ways – the age was lowered to fourteen, and a requirement was added that, in all cases, the court was to 'take into account' the wishes of the child.
- The power to order supervision of access orders by welfare officers was broadened to include custody orders.
- A provision was added to enable the Attorney-General to appoint enforcement officers to execute warrants issued by the courts to take possession of children pursuant to custody and access orders.
- The requirement that a court, in hearing an application for a property settlement, was to take into account the contribution of a party as homemaker or parent (one of the criteria introduced by the previous Bill) was broadened to include contributions to the conservation or improvement – as well as the acquisition – of the property in question.

Other changes were of minor importance or made to improve the drafting of the legislation. Once again, some of the changes were made as a result of comments received on the previous Bill and, at the conclusion of his speech,[36] the Attorney-General said he would welcome further comment.

Public Reaction to the Bill

Shortly after the reintroduction of the Bill into the Senate on 1 August 1974, public reaction to the Bill seemed to swell noticeably. This was reflected in many ways: in the increased volume of correspondence received by the Attorney-General and other Ministers and members of Parliament; in the number of petitions received for presentation in Parliament; and in the attention given to the subject in the media. I have already indicated that Senator Murphy made a point of keeping the public

34. *Id.*, 644.
35. Sen. Deb., 1 Aug. 1974, 758.
36. *Id.*, 760.

informed of his intentions regarding the Bill, from the time he first announced his intention to introduce divorce reform legislation in April 1973. No doubt as a result of press reports of his early announcements, a number of public opinion polls were conducted between September 1973 and May 1975 on public reaction to a no-fault ground of divorce as an alternative to, or substitute for existing grounds of divorce. Both my predecessor and I, not to mention other supporters of the Bill in Parliament, regarded the results of these polls as being of at least some relevance, because divorce is something that can affect every stratum of society and is a subject on which most persons are capable of having and are likely to have a decided view. We also took the view that the polls collectively offered a better guide to opinion in the community as a whole than correspondence and petitions received by Ministers and members of Parliament. The latter are often inspired by pressure groups anxious to create an impression of stronger public support for their views than they actually have. I therefore set out below a tabular summary of the results of six public opinion polls conducted over the period mentioned, including the question asked and the size of the sample.

(1) *Poll conducted by:* Australian Public Opinion Polls (the Gallup Method)
Date: 5 September 1973
Sample: 2129 persons
Question asked: The Federal Attorney-General has proposed that in future the only ground for divorce should be evidence of twelve months' separation. This will make divorce easier to obtain. Do you think this is a good thing or a bad thing?

	C. of E. members	R.C. members	A.L.P. voters	L.C.P. voters	Men	Women	All persons interviewed
Approve	68%	54%	71%	56%	64%	62%	63%

(2) *Poll conducted by:* Morgan Gallup Poll, North Sydney
Date: October 1973
Sample: 2153 persons
Question asked: If a husband and wife tell the court their marriage is broken, should a divorce be granted or not? If granted, immediately or after an interval? If interval, after how long?

	Protestant members	R.C. members	All persons interviewed
Approve immediately	29.3%	31.0%	31.1%
Approve, after 12 months	42.5%	30.2%	38.6%
Total	71.8%	61.2%	69.7%

(3) *Poll conducted by:* Australian Sales Research Bureau Pty Ltd, Sydney
Date: November 1973
Sample: 1906 persons
Question asked: Should marriages be dissolved –
(a) only by death;
(b) when one party commits an offence;
(c) by mutual consent; or
(d) at the wish of one partner only.

	C. of E. members	R.C. members	A.L.P. voters	Lib. voters	Men	Women	All persons interviewed
Approve (c)	62.7%	44.5%	59.8%	56.2%	57.6%	57.5%	57.5%
Approve (d)	6.8%	6.1%	9.2%	6.8%	7.1%	7.9%	7.5%
Total	69.5%	50.6%	69.0%	63.0%	64.7%	65.4%	65.0%

(4) *Poll conducted by:* Morgan Gallup Poll
Date: October 1974
Sample: 2350 persons
Question asked: Reference was made to the proposal that the only grounds for divorce should be that the marriage has broken down completely. The husband or wife would not then have to prove the other was at fault. Would you approve – or disapprove – divorce when a marriage has broken down completely? If approve – how long should they then have to wait for a divorce?

	Protestant members	R.C. members	A.L.P. voters	L.C.P. voters	Men	Women	All persons interviewed
Approve new breakdown ground	77.2%	65.1%	79.2%	73.1%	71.3%	77.1%	74.2%
No wait	21.3%	19.5%	24.0%	20.9%	23.4%	20.3%	21.9%
Less than 1 year	24.1%	20.1%	24.0%	23.9%	21.8%	24.5%	23.2%
1 year	16.7%	10.9%	15.8%	15.2%	13.9%	15.6%	14.7%
Total 1 year or less	62.1%	50.5%	63.8%	59.9%	59.1%	60.4%	59.8%

(5) *Poll conducted by:* Morgan Gallup Poll
Date: March 1975
Sample: 2044 persons
Question asked: If a married couple agrees to divorce, how long should they have to wait for it? And if they don't agree, I mean if only the husband or the wife wants a divorce, how long should the wait be?

	If sought by both parties	If sought by one party
Approve divorce with no wait, or wait up to 12 months	70%	46%
Wait 2 years	12%	19%

(6) *Poll conducted by:* Australian Public Opinion Polls (the Gallup Method)
Date: May 1975
Sample: 2003 persons
Question asked: Do you yourself favour a separation period of one year or two years before a couple can obtain a divorce?

	A.L.P. voters	L.-N.C.P. voters	Men	Women	All persons interviewed
One year	65%	52%	60%	55%	58%
Two years	27%	40%	31%	37%	34%

Alongside these results may be set the results of a public opinion poll on attitudes to marriage, which was frequently referred to by opponents of the Family Law Bill in debate in the House of Representatives and elsewhere.

Poll conducted by: Australian Public Opinion Polls
Date: January 1975
Sample: 2127 persons
Question asked: Do you believe in marriage as a lifetime contract, or as a contract which may be broken after a fairly short time if the parties cannot get along with each other, or as a contract which may be broken only after a relatively long time and under extreme provocation?

	C. of E. members	R.C. members	Men	Women	All persons interviewed
Lifetime contract	43%	56%	48%	44%	46%
Dissoluble after short time	28%	20%	29%	25%	27%
Dissoluble after long time	27%	22%	21%	29%	25%

Each of the polls on possible grounds of divorce included a ground which was similar in varying degrees to the ground of divorce contained in the Family Law Bill. The polls were therefore of some value as a guide to the attitude of the public to the Family Law Bill – or at least to its divorce provisions. In the case of the poll on marriage, the way the questions were framed probably suggested to most persons interviewed that they were being called on to express a view on the ideal duration of marriage as seen from its threshhold, rather than on the circumstances in which parties to an existing marriage that has run into difficulties should be able to obtain a divorce. This would account for the apparent conflict with the views expressed in the other six polls.

Report of the Senate Standing Committee on Constitutional and Legal Affairs

Some two weeks after introducing the (third) Family Law Bill into the Senate, Senator Murphy moved two motions on 16 August 1974 which were carried by the Senate, to reappoint the Senate Standing Committee on Constitutional and Legal

Affairs, and to empower the Committee to consider the clauses of the Family Law Bill during its consideration of the reference on the law and administration of divorce. The latter motion required the Committee to report to the Senate by 18 September 1974. This date was later extended by a further resolution to 18 October. Since some of the hearings of the Committee had not been open to the public, and other evidence and submissions to it were not generally available to other Senators, the Senate resolved at the same time to authorize the Committee to table all the evidence and documents presented to it. This authority was subsequently exercised on 24 September when, in tabling an interim report,[37] the Chairman of the Committee, Senator James McClelland,[38] also tabled part of the Committee's transcript of evidence.

In its interim report of 24 September, the Senate Committee expressed general agreement with the intention of the Bill to substitute a single ground of irretrievable breakdown of marriage for the existing fault grounds of divorce. The report foreshadowed a number of recommendations for changes in the Bill, notably for the establishment of a separate Family Court. The Committee tabled its final report on both the divorce law reference and the Family Law Bill on 15 October.[39] In general, this report overwhelmingly supported the main objects and provisions of the Bill. This is the more significant because the Committee reached its conclusions against the background of the evidence and views on the existing divorce law collected over a period of more than two and a half years. The main conclusions and recommendations of the Committee may be summarized as follows:

- The Committee 'unanimously reached the view that the provision of irretrievable breakdown of a marriage, based on a period of separation as the sole ground of divorce is proper and in the public interest. When applied in the context of a broadly based Family Court, as the Committee recommends [see below], the clause [providing for this ground of dissolution] will, in the Committee's view, satisfy the criteria expressed by the English Law Commission,[40] and bring a degree of honesty and dignity to the administration of Australia's national divorce law. There should no longer be any encouragement to perjury, exaggeration, false attitudes or the need for discretion statements.'[41]
- A majority of four members of the Committee approved of the twelve months period provided for in the Bill as proof of irretrievable breakdown; a minority of

37. *Supra* note 27, *loc. cit.*

38. Subsequently Minister for Manufacturing Industries then Minister for Labour and Immigration in the Whitlam Government, 1975.

39. *Report on the Law and Administration of Divorce and Related Matters and the Family Law Bill 1974*, (1974) Parl. Pap. No. 133.

40. "A good divorce law should seek to achieve the following objectives:
(i) To butress, rather than to undermine, the stability of marriage; and
(ii) When, regrettably, a marriage has irretrievably broken down, to enable the empty legal shell to be destroyed with the maximum fairness and the minimum bitterness, distress and humiliation."
Reform of the Grounds of Divorce: The Field of Choice (Nov. 1966) Cmnd 3123, para. 15, quoted by Senator Murphy in his second reading speech on the Family Law Bill 1973, Sen. Deb., 13 Dec. 1973, 2828.

41. *Supra* note 39, *op. cit.* para. 54.

two members favoured the substitution of a two years' period. The Committee unanimously recommended, however, that the period of separation must have been completed at the date of filing the divorce application, not the date of hearing of the application by the court as provided in the Bill.

- The circumstances in which a marriage was to be void would need to be defined, whether in the Bill or in other legislation, before the Bill came into operation.
- The reconciliation and counselling provisions should be further strengthened, and made available to parties to a marriage where there were no proceedings between them or even contemplated. Specific provision should also be made in the case of parties married for less than two years, in place of the restrictions in section 43 of the Matrimonial Causes Act, which the Committee regarded as 'too rigid . . . and too arbitrary in the nature of its exceptions'.[42]
- The Committee recommended that applications for maintenance of a party or regarding matrimonial property be permitted more than twelve months after the decree *nisi* with the leave of the court (that is, restoration of the form of provision in the original 1973 Bill).
- The Committee suggested only minor amendments to the welfare and custody of children provisions.
- In providing for maintenance applications to be based on need, the relevant provisions of the Bill, in the Committee's view, represented 'a significant improvement'.[43] The Committee expressed agreement 'with the general object of the Bill in respect to maintenance where it seeks to encourage the parties to be financially independent'.[44] It did, however, feel that certain amendments should be made to give slightly greater flexibility to the courts in dealing with maintenance applications, and to make other minor changes.
- The Committee felt that the courts should have the power to order property settlements (rather than merely to declare existing interests in property) in circumstances other than where the parties were being or had been divorced.
- While agreeing with the abolition of imprisonment for non-payment of maintenance, the Committee expressed the view that courts needed to have the power to punish contempt of court by imprisonment. Accordingly, it recommended insertion of a section in the Bill establishing a code of procedure for dealing with contempt.
- Instead of a Family Law Advisory Committee, a Family Law Council was recommended. The Council would have the additional power to make recommendations of its own motion and would also be required to furnish an annual report for presentation to Parliament.
- The Committee endorsed the principle that each party to proceedings under the Bill should, as a general rule, bear his or her own costs. However, it recommended a wider discretion for the courts to make an order for costs in a particular case. It

42. *Id.*, para. 31.
43. *Id.*, para. 64.
44. *Id.*, para. 65.

also recommended insertion of a provision to give a party to proceedings a right to apply for legal aid.

The biggest single addition recommended to the Bill and undoubtedly the most important recommendation contained in the report, was a proposal for establishing a Family Court of Australia.[45] The Committee recommended that the Family Court exercise not only the jurisdiction proposed to be given by the Bill to the Superior Court, but also, ultimately, the jurisdiction proposed to be given to the courts of summary jurisdiction. The Family Court would:

- deal exclusively with family law matters;
- be a 'helping' court;
- be composed of judges appointed specifically for their suitability for dealing with family law matters;
- be housed in suitably informal surroundings; and
- have attached to it ancillary staff including welfare officers, marriage counsellors and legal advisers.

In general the Committee saw the creation of the Family Court as

> essential to give substance to [the] reconciliation provisions of the Bill . . . and where reconciliation fails, as playing a major role in reducing the area of disharmony and bitterness and facilitating the settlement of custody, access and property disputes.[46]

The Committee felt that the creation of the Court would

> put Australia in the forefront of family law reform and will ensure that other facilities and remedies provided in the Bill can have effective implementation.[47]

Senator Murphy welcomed the report of the Senate Standing Committee. He acknowledged the value of its recommendations by giving notice soon afterwards of his intention to move a series of amendments to the Bill that would give substantial effect to the great majority of the Committee's recommendations. These amendments were subsequently carried by the Senate. One or two of the very few recommendations that Senator Murphy had not accepted were moved by other Senators and also carried by the Senate.[48] The net result of the passage of the Bill through the Senate was that the Bill, while owing its inspiration and broad outline to Senator Murphy, bore the unmistakable stamp of the Senate Committee's admirable work and recommendations.

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45. In reaching their conclusions on the need for a Family Court, the Committee expressed their indebtedness to a paper entitled "An Australian Family Court" by R. S. Watson, Q.C. of the Sydney Bar. As special consultant to the Attorney-General on family law matters during 1974-75, Mr Watson gave invaluable assistance to both my predecessor and myself, and to the Attorney-General's Department, during the preparation of the Family Law Bill and its passage through Parliament.

46. *Supra* note 39, *op. cit.* para. 44.

47. *Id.*, para. 46.

48. In particular, all the recommendations of the Committee referred to above were effectively incorporated in the Bill.

Passage of the Bill through the Senate

After more than ten months from the first introduction of the Family Law Bill into the Senate, debate on the second reading commenced on 29 October 1974. The debate through all stages in the Senate occupied more than twenty-eight sitting hours spread over six days up to 27 November. The Attorney-General had announced on introducing the original Family Law Bill that members of the Australian Labor Party would have a free vote on the Bill, and on the resumption of the second reading debate representatives of the Opposition parties made similar announcements.

Opponents of the Bill concentrated their attention on the proposed ground of divorce, the maintenance provisions, the costs provisions and the proposed Family Court of Australia. The ground of divorce was said to threaten the institution of marriage by enabling one party to obtain a divorce after twelve months whether or not the other party objected, and would thus encourage persons to regard marriage as a temporary institution. It was urged that the period of separation constituting a ground of divorce should be longer, and an alternative immediate ground based on conduct should also be provided. The no-fault concept of the ground of divorce was criticized as not achieving the object of reducing hostility between parties, because conduct would be examinable in custody and maintenance proceedings. The maintenance provisions were criticized as removing the duty of a man to support his wife and imposing on the woman a positive primary duty to maintain herself, and also her husband in some circumstances. The costs provisions were said to impose hardship on a wife dependent upon her husband. The family court proposals were criticized as being of uncertain benefit, imposing an additional burden on the taxpayer and, owing to the constitutional limitation on the power of the Australian Parliament, being deficient because no retirement age could be prescribed for the judges of the court.

Supporters of the Bill denied that the proposed ground of divorce threatened existing or future marriages, arguing that a successful marriage did not depend for its success upon restrictive divorce laws. They denied that people were influenced in their decision to marry by the state of the divorce law. Nor was the divorce rate an indication of the marriage breakdown rate. Divorce was sought only by those who despaired of being able to continue their marriage, and the ground provided for in the Bill was designed to enable them to obtain release from that intolerable relationship after what was generally regarded as a reasonable period, without having publicly to blame the conduct of the other party to the marriage. The conduct of parties that would be examinable in maintenance and custody proceedings would be limited to conduct relevant to those issues, and would not be conduct at large. The maintenance provisions would, they contended, ensure adequate protection and help for any wife or divorced wife left without adequate means. They asserted that the Family Court was justified because existing courts had been found to be unsuitable and ill-equipped to deal sympathetically and helpfully with the particular problems of family disputes. As to costs, the power vested in the courts to make an order in a particular case, together with the guarantee of legal aid, would ensure that no person would be denied legal assistance through having insufficient means.

Apart from the amendments based on the Senate Committee's recommendations,[49] a small number of other amendments were made to the Bill in its passage through the Senate. Senator Murphy successfully moved the insertion of what is now section 43, which contains a list of principles to be observed by courts exercising jurisdiction under the Act. These include such matters as the need to protect the institution of marriage, the family and the interests of children. He moved the inclusion of what is now section 116, providing for the establishment of an Institute of Family Studies to promote research into factors affecting marital and family stability. On his motion also, section 122 was inserted to permit a legal practitioner admitted to practise in any federal court to practise as such in any State court exercising jurisdiction under the Act. Sections 86 and 87, providing for both registration of maintenance agreements and approval of such agreements entered into in substitution for rights under the Act, were included on the motion of Senator Everett.[50] Last, but not least, what is now section 41, providing for the possible establishment of State Family Courts, was inserted on the motion of Senator Missen.[51] Section 41 requires the Australian Government to attempt to reach agreement with the States for the establishment of State Family Courts which are to be financed by the Australian Government; judicial appointments to them are to be approved by the Australian Attorney-General. Judges are also required to be suitable for family law work – in the same way as Judges of the Family Court of Australia – and must retire at 65. The supporters of the amendment saw it as an opportunity for Federal-State co-operation and, more specifically, as a way around the problem of Parliament's lack of constitutional power to fix a retirement age limit for Judges of the Family Court of Australia.

Passage of the Bill through the House of Representatives

Having completed its passage through the Senate on 27 November 1974, the Bill was introduced into the House the following day by the Prime Minister. Debate on the second reading was immediately adjourned until 11 February 1975. In fact the debate was resumed on 12 February, and continued for more than twenty-eight sitting hours[52] over eight days up to 21 May. The arguments advanced by supporters and opponents of the Bill, although taking many forms and accompanied by many examples, boiled down to essentially the same as those used in the Senate debate. During the debate on the second reading of the Bill a total of fifty-nine members – nearly half of the House – made speeches, which must in itself be close to a record. As in the Senate debate, the clause (now section 48) providing for the ground of divorce came under the closest scrutiny in the course of the Committee stage debate when various amendments were moved – unsuccessfully – to the clause. Again, as in the Senate debate, the provisions for the Family Court of Australia were put to the test, by a motion, which was defeated, to omit them from the Bill. In the event, only eleven amendments to the Bill were carried, and of these only two were anything more than

49. *Supra*, text to note 48.
50. Australian Labor Party, Tasmania, and a member of the Senate Committee.
51. Liberal Party, Victoria, and also a member of the Senate Committee.
52. *I.e.* about the same time as in the Senate.

purely formal, drafting amendments. One inserted an additional item in the list of considerations to which the courts are to have regard in maintenance applications. This item is now section 75(2)(l) and reads:

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

The only other amendment of any substance added the power, now contained in section 106(b), to make regulations enabling a court officer, or a specified authority or person, to take enforcement proceedings on behalf of persons awarded maintenance under the Act. All amendments made in the House were subsequently agreed to by the Senate, and the Bill received the Royal Assent on 12 June 1975.

Family Courts

In public discussion of the Family Law Act, most of the attention has understandably, and quite properly, focused on the ground of divorce and, to a lesser extent, the maintenance provisions. While not underrating the magnitude of the reforms to the divorce and maintenance laws, I feel sure that, in time, the provision for the establishment of Family Courts will come to be seen as a reform of equal importance.

The essential distinguishing feature of the Family Courts is, as their name implies, that they will be dealing only with family law matters. When they are fully established, they will be able to exercise the whole of the jurisdiction under the Family Law Act and, in the Territories at least, jurisdiction over adoptions, maintenance and custody of ex-nuptial children.[53] In accordance with the Senate Committee's recommendations,[54] a novel requirement has been included in the Family Law Act regarding the appointment of Judges to the Family Courts. This is the requirement that appointees must be "by reason of training, experience and personality . . . suitable to deal with matters of family law".[55]

The other singular provision, to be found in Part IV of the Act providing for the establishment of the Family Court of Australia, requires the appointment of a Director of Counselling and Welfare and such other counsellors and welfare officers as are necessary.[56] The Director is charged with statutory responsibilities under Part III of the Act relating to counselling and reconciliation. This will hopefully mean that parties will have every opportunity to obtain assistance, beyond just legal advice, with their problems.

Although there is no reference in the Act to the housing of Family Courts, the report of the Senate Committee envisages that they will occupy suitably modern and

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53. Because of constitutional limitations, jurisdiction could not be conferred on courts by the Act to determine maintenance and custody proceedings relating to ex-nuptial children or adoption proceedings in the States.

54. *Supra* text to note 45.

55. 22(2)(b), and 41(4)(b).

56. S. 37(8).

informal premises, which will eschew the formality and traditionally awe-inspiring surroundings of the Supreme Courts and the sometimes crowded and cramped accommodation of magistrates' courts. It is hoped that there will be a friendly atmosphere in these Courts. The Act itself requires that courts hearing proceedings "shall proceed without undue formality and shall endeavour to ensure that the proceedings are not protracted".[57] Neither the Judge hearing the proceedings nor counsel are to robe.[58]

I entertain the very real hope that the Family Courts – both Federal and State – will mean a new deal for parties to family disputes. There is here a unique opportunity for a complete new start to be made in the law and the administration of divorce, custody and other family matters. The Parliament has provided the tools in the form of this sweeping new law: I feel sure that the new courts, the legal profession, marriage counsellors and welfare officers will join together in this new enterprise and make it work.

57. S. 97(3).
58. S. 97(4).